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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 15, 1974

CERTIORARI GRANTED OCTOBER 15, 1974

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May 16	Order [consolidating Civil No. 73-86-2, *Alcala*, with Civil No. 73-110-2, *Doe and Roe*]
May 29	Amendment to Answer, Re: *Alcala*
May 29	Answer, Re: *Doe and Roe*
July 31	Findings of Fact, Conclusions of Law and Order for Judgment
July 31	Judgment
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August 27	Application for Stay of Judgment
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On the 4th day of April, 1973, the following COMPLAINT was filed in *Alcala* in the United States District Court, Southern District of Iowa:

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

LINDA ALCALA, Individually and on behalf of all other persons similarly situated, Plaintiff, vs. KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services, Defendants.	)	CIVIL NO. 73-86-2

*** ***

I.

Preliminary Statement

1. Plaintiff, individually and on behalf of all other persons similarly situated, seeks to have this Court declare invalid and enjoin the Defendants' actions as being in violation of a federal statute, 42 U.S.C.A. § 606(a). The Defendants have interpreted the Iowa State Department of Social Service Employees Manual, Section V, Chapter 5, pages 1, 4, 9, and 28 to exclude from the definition of "child," and "unborn child," when the fact of pregnancy has been determined by medical diagnosis. Thus the Plaintiff's application for AFDC assistance has been refused on the ground that there is "no eligible child in the household." The Defendants' actions are challenged on the grounds that they are in conflict with the guarantees contained in the Fifth and Fourteenth Amendments of the Constitution of the United States, and with the Social Security Act itself.

II.
Jurisdiction

2. Jurisdiction is conferred in this Court by 28 U.S.C. §1343(3), which provides for original jurisdiction of this Court in suits to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal civil rights of all persons within the jurisdiction of the United States.

3. This action is authorized by and brought under 42 U.S.C.A. § 1983, which provides a cause of action for the deprivation under color of law of rights, privileges or immunities guaranteed by the Constitution and laws of the United States.

4. Declaratory relief is authorized by 28 U.S.C.A. §§ 2201 - 2202, and by Rule 57 of the Federal Rules of Civil Procedure.

III.
Parties

5. The named Plaintiff, Linda Alcala, is currently pregnant and is not married.

6. Plaintiff is and has been during all relevant periods a resident of Scott County, Iowa.

7. Defendant, James N. Gillman, is the Commissioner of the Iowa State Department of Social Services.

8. Defendant, Michael Ryan, is the Director of the Scott County Department of Social Services.

9. The Defendants are charged under the statutes of the United States, 42 U.S.C.A. § 602(a), and the statutes of the State of Iowa, Code of Iowa §§ 217.1, 234.6, 234.12, with the enforcement, operation, and executions of laws pertaining to AFDC, and the Defendants' interpretation of 42 U.S.C.A. § 606(a) is herein challenged as being in conflict with the Constitution and statutes of the United States.

IV.
Class Action

10. The named Plaintiff brings this action on her own behalf, and on behalf of all other persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The members of the class similarly situated are expectant mothers who are denied AFDC payments by reason of the Defendants' interpretation of 42 U.S.C.A. § 606(a) so as to not include an unborn child within the term "dependent child."

11. The requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impractical, there are questions of law and fact common to the class, the claims of the representative parties will fairly and adequately protect the interests of the class, and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory

relief with respect to the class as a whole.

V.
Facts

12. Title 42 U.S.C.A. §606(a) defines "dependent child" as "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent and who is living with his father, mother . . . and (2) who is (A) under the age of eighteen or (B) under the age of twenty-one and (as determined by the state in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."

13. The Department of Health, Education and Welfare's Handbook of Public Assistance Administration, Part IV, § 3142 has stated, since 1946, that "child" as used in 42 U.S.C.A. §606(a) includes "unborn child." On February 27, 1971, this was modified in 45 C.F.R. § 233.90(c)(2)(ii) as follows:

> (c)(2) Federal financial participation is available in: . . .
> (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis; . . .

14. The Employees Manual of the Iowa Department of Social Services does not explicitly say an unborn child is ineligible for AFDC but it has been so interpreted by the Scott County Department of Social Services. The relevant Sections from which this inference has been made are:

> A. Section V, Chapter 5, page 1: "Aid to Dependent Children may be paid for a child under the age of 16. . . ."
> B. Section V, Chapter 5, page 4: "the child of an unwed mother meets the eligibility requirements of deprivation. The child is entitled to assistance and medical expenses when it meets the other eligibility requirements."
> D. Section V, Chapter 5, page 28: "the eligible group in aid to Dependent Children shall include the eligible children . . ."

15. Title 42 U.S.C.A. § 602(a) provides that state and local agencies will administer the AFDC program.

16. Plaintiff's child is due in July, 1973.

17. Plaintiff is currently only able to work approximately ten hours per week because of her condition and her employer has indicated he will no longer be able to continue her employment past April 1, 1973.

18. Plaintiff has no savings and currently has weekly income of $15.

19. Because of her indigency, Plaintiff is unable to provide adequately for herself or prepare adequately for the birth of her child.

20. Plaintiff would be eligible for AFDC payments if her child had

already been born.

21. Plaintiff applied for AFDC payments to the Department of Social Services, Scott County, on February 22, 1973.

22. On March 16, 1973, Plaintiff's application was rejected on the grounds that there was "no eligible child in the household."

23. Plaintiff appealed the denial of AFDC payments on March 22, 1973; that appeal will not be heard until approximately May 10, 1973.

24. If Plaintiff were to receive AFDC payments, she would receive $151 per month.

25. Because Plaintiff has been denied AFDC payments, Plaintiff has suffered and will continue to suffer irreparable injury, both to herself and to her unborn child, due to both the lack of proper nutrition she is receiving and her inability to adequately prepare for her baby. Said irreparable injury will continue unless Defendants are enjoined from denying Plaintiff AFDC payments.

26. As a result of the events set forth in Paragraphs 18 through 25 of this Complaint, Plaintiff has suffered actual damages at the rate of $151 per month up to the date of this filing of not less than $200.

VI.
Causes of Action

27. FOR A FIRST CAUSE OF ACTION, Plaintiff states that the actions of the Defendants by their interpretation of 42 U.S.C.A. § 606(a) and the Employees Manual violate Plaintiff's rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and outlined specifically in *Stanley v. Illinois*, ____ U.S. ____, 92 S. Ct. 1208 (1972), in that said actions constitute an invalid conclusive presumption that Plaintiff is not a needy person with a child.

28. FOR A SECOND CAUSE OF ACTION, Plaintiff states that the actions of Defendants and the Defendants' interpretation of 42 U.S.C.A. § 606(a) and the Employees Manual, violate the Plaintiff's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution in that:

A. They deny AFDC eligibility to an applicant who is expecting a child and the fact of pregnancy has been determined by medical diagnosis;

B. This creates two classes of persons with regard to eligibility for AFDC eligibility;

C. The first class consists of needy women who have given birth to a child;

D. The second class consists of needy women who have had their pregnancy determined by medical diagnosis but who have not yet given birth to their child;

E. The first class of women are eligible for AFDC payments while the second class is not; and

F. There is no adequate governmental justification for this classification.

29. FOR A THIRD CAUSE OF ACTION, Plaintiff states that actions of the Defendants violate the Supremacy Clause and federal statutory law according to the rules of construction laid down by the United States Supreme Court in *King v. Smith*, 392 U.S. 390 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971), and *Carleson v. Remillard*, ____ U.S. ____, 92 S. Ct. 1932 (1972), in that they have restricted eligibility for AFDC benefits to exclude persons eligible under federal statutes and regulations, namely 42 U.S.C.A. § 606(a) and 45 C.F.R. § 233.90(c)(2)(ii).

VII.
Prayer for Relief

WHEREFORE, Plaintiff respectfully prays on behalf of herself and all others similarly situated that the Court:

A. Assume jurisdiction of this cause, and promptly set this case down for hearing;

B. Determine by order prusuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure that this action be maintained as a class action;

C. Pending a hearing and determination by this Court, grant a Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to the Plaintiff by refusing to grant AFDC assistance in the amount to which Plaintiff is entitled on the ground that Plaintiff's unborn child is not a "dependent child";

D. Enter a declaratory judgment pursuant to 28 U.S.C.A. §§ 2201-2202 and Rules 54, 57, and 58 of the Federal Rules of Civil Procedure declaring Defendants' actions in their interpretation of the Employees Manual to be invalid on the grounds that they violate 42 U.S.C.A. § 606(a), the Supremacy Clause and the Fifth and Fourteenth Amendments to the Constitution of the Untied States;

E. Enter a preliminary and permanent injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining Defendants and their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant Plaintiff AFDC assistance in the amounts to which they are entitled on the grounds that the Plaintiff's unborn child does not constitute a "dependent child";

F. Grant the Plaintiff monetary damages in the amount of $151 per month, which is not less than $200 as of the date of this filing, for assistance wrongfully withheld;

G. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow Plaintiff costs herein;

H. Grant additional or alternative relief as may seem to this Court to be just, proper, and equitable.

Respectfully submitted,

s/ Plaintiffs' Counsel

(Certificate of service omitted in printing)

On the 9th day of May, 1973, the following ANSWER was filed in *Alcala* in the United States District Court, Southern District of Iowa:

(Title omitted in printing)

COME NOW the Defendants and for Answer to Plaintiff's Complaint state:

1. That the Defendants admit the allegations contained in Paragraphs one (1), five (5), six (6), seven (7), eight (8), nine (9), twelve (12), fourteen (14), fifteen (15), twenty (20), twenty-one (21), twenty-two (22), and twenty-three (23) of Plaintiff's Complaint;

2. That Defendants deny the allegations contained in Paragraphs two (2), three (3), four (4), ten (10), eleven (11), thirteen (13), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight A (28A), twenty-eight B (28B), twenty-eight C (28C), twenty-eight D (28D), twenty-eight F (28F), and twenty-nine (29) of Plaintiff's Complaint;

3. That Defendants are without sufficient knowledge as to the truth of the allegations contained in Paragraphs sixteen (16), seventeen (17), eighteen (18) and nineteen (19) of Plaintiff's Complaint and therefore deny the same.

WHEREFORE, Defendants PRAY that Plaintiff's Complaint be dismissed.

s/ Defendants' Counsel

(Certificate of service omitted in printing)

On the 16th day of May, 1973, the following COMPLAINT was filed in *Doe and Roe* in the United States District Court, Southern District of Iowa:

JANE DOE AND JOAN ROE,

Plaintiffs,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Defendants.

CIVIL NO.

73-110-2

I.
Preliminary Statement

1. Plaintiffs seek to have this Court declare invalid and enjoin the Defendants' actions as being in violation of a federal statute, 42 U.S.C.A. § 606(a). The Defendants have interpreted the Iowa State Department of Social Services Employees Manual, Section V, Chapter 5, pages 1, 4, 9, and 28 to exclude from the definition of "child," an "unborn child," when the fact of pregnancy has been determined by medical diagnosis. Thus the Plaintiffs' applications for AFDC assistance have been refused on the ground that there is "no eligible child in the household." The Defendants' actions are challenged on the grounds that they are in conflict with the guarantees contained in the Fifth and Fourteenth Amendments to the Constitution of the United States, and with the Social Security Act itself.

II.
Jurisdiction

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3), which provides for original jurisdiction of this Court in suits to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal civil rights of all persons within the jurisdiction of the United States.

3. This action is authorized by and brought under 42 U.S.C.A. § 1983, which provides a cause of action for the deprivation under color of law of rights, privileges or immunities guaranteed by the Constitution and laws of the United States.

4. Declaratory relief is authorized by 28 U.S.C.A. §§ 2201 - 2202, and by Rule 57 of the Federal Rules of Civil Procedure.

III.
Parties

5. The named Plaintiffs, Jane Doe and Joan Roe, are currently pregnant. Both Plaintiffs bring this suit under assumed names to avoid publicity concerning them and their families.

6. Plaintiffs are and have been during all relevant periods residents of Scott County, Iowa.

7. Defendant, Kevin J. Burns, is the Acting Commissioner of the Iowa State Department of Social Services.

8. Defendant, Michael Ryan, is the Director of the Scott County Department of Social Services.

9. The Defendants are charged under the statutes of the United States, 42 U.S.C.A. § 602(a), and the statutes of the State of Iowa, Code of Iowa §§ 217.1, 234.6, 234.12, with the enforcement, operation, and execution of laws pertaining to AFDC, and the Defendants' interpretation of 42 U.S.C.A. § 606(a) is herein challenged as being in conflict with the Consitution and statutes of the United States.

IV.
Facts

10. Title 42 U.S.C.A. § 606(a) defines "dependent child" as

> a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent and who is living with his father, mother . . . and (2) who is (A) under the age of eighteen or (B) under the age of twenty-one and (as determined by the state in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

11. The Department of Health, Education and Welfare's Handbook of Public Assistance Administration, Part IV, § 3142 has stated, since 1946, that "child" as used in 42 U.S.C.A. § 606(a) includes "unborn child." On February 27, 1971, this was codified in 45 C.F.R. § 233.90(c)(2)(ii) as follows:

> (c)(2) Federal financial participation is available in: . . .
> (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis; . . .

12. The Employees Manual of the Iowa Department of Social Services does not explicitly say an unborn child is ineligible for AFDC but it has been so interpreted by the Scott County Department of Social Services. The relevant sections from which this inference has been made are:

> A. Section V, Chapter 5, page 1: Aid to Dependent Children may be paid for a child under the age of 16. . . .

B. Section V, Chapter 5, page 4: the child of an unwed mother meets the eligibility requirements of deprivation. The child is entitled to assistance and medical expenses when it meets the other eligibility requirements."

D. Section V, Chapter 5, page 28: the eligible group in aid to Dependent Children shall include the eligible children. . .

13. Title 42 U.S.C.A. § 602(a) provides that state and local agencies will administer the AFDC program.

14. Plaintiff Roe's child is due in July, 1973, and Plaintiff Doe's child is due in November, 1973.

15. Plaintiffs are currently unable to work because of their conditions.

16. Plaintiffs have no savings and no current incomes.

17. Because of their indigency, Plaintiffs are unable to provide adequately for themselves or prepare adequately for the births of their children.

18. Plaintiffs would be eligible for AFDC payments if their children had already been born.

19. Plaintiff Roe applied for AFDC assistance to the Department of Social Services, Scott County, on April 14, 1973; Plaintiff Doe applied on April 27, 1973.

20. On April 16, 1973, Plaintiff Roe's application was rejected on the ground that there was "no eligible child in the household," and on May 3, 1973, Plaintiff Doe's application was rejected on the ground that there was "no eligible child in the household."

21. If Plaintiffs were to receive AFDC payments, they would each receive $151 per month.

22. Because Plaintiffs have been denied AFDC payments, Plaintiffs have suffered and will continue to suffer irreparable injury, both to themselves and to their unborn children, due to both the lack of proper nutrition they are receiving and their inability to adequately prepare for their babies. Said irreparable injuries will continue unless Defendants are enjoined from denying Plaintiffs AFDC payments.

23. As a result of the events set forth in Paragraphs 16 through 22 of this Complaint, Plaintiffs have suffered actual damages at the rate of $151 per month up to the date of this filing.

V.
Causes of Action

24. FOR A FIRST CAUSE OF ACTION, Plaintiffs state that the actions of the Defendants by their interpretation of 42 U.S.C.A. § 606(a) and the Employees Manual violate Plaintiffs' rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and outlined specifically in *Stanley v. Illinois*, ____ U.S. ____, 92 S.Ct. 1208 (1972), in that said actions

constitute an invalid conclusive presumption that Plaintiffs are not needy persons with children.

25. FOR A SECOND CAUSE OF ACTION, Plaintiffs state that the actions of Defendants and the Defendants' interpretation of 42 U.S.C.A. § 606(a) and the Employees Manual, violate the Plaintiffs' rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution in that:

A. They deny AFDC eligibility to an applicant who is expecting a child and the fact of pregnancy has been determined by medical diagnosis;

B. This creates two classes of persons with regard to eligibility for AFDC eligibility;

C. The first class consists of needy women who have given birth to a child;

D. The second class consists of needy women who have had their pregnancy determined by medical diagnosis but who have not yet given birth to their child;

E. The first class of women are eligible for AFDC payments while the second class is not; and

F. There is no adequate governmental justification for this classification.

26. FOR A THIRD CAUSE OF ACTION, Plaintiffs state that actions of the Defendants violate the Supremacy Clause and federal statutory law according to the rules of construction laid down by the United States Supreme Court in *King v. Smith*, 392 U.S. 390 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971); *Carleson v. Remillard*, ____ U.S. ____, 92 S.Ct. 1932 (1972), in that they have restricted eligibility for AFDC benefits to exclude persons eligible under federal statutes and regulations, namely 42 U.S.C.A. § 606(a) and 45 C.F.R. § 233.90(c)(2)(ii).

VI.
Prayer for Relief

WHEREFORE, Plaintiffs respectfully pray that the Court:

A. Assume jurisdiction of this cause, and promptly set this case down for hearing;

B. Pending a hearing and determination by this Court, grant a Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to the Plaintiffs by refusing to grant AFDC assistance in the amount to which Plaintiffs are entitled on the ground that Plaintiffs' unborn children are not "dependent children";

C. Enter a declaratory judgment pursuant to 28 U.S.C.A. §§ 2201-

2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring Defendants' actions in their interpretation of the Employees Manual to be invalid on the grounds that they violate 42 U.S.C.A. § 606(a), the Supremacy Clause and the Fifth and Fourteenth Amendments to the Constitution of the United States;

D. Enter a preliminary and permanent injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining Defendants and their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to grant Plaintiffs AFDC assistance in the amounts to which they are entitled on the grounds that the Plaintiffs' unborn children do not constitute "dependent children";

E. Grant the Plaintiffs each monetary damages in the amount of $151 per month, for assistance wrongfully withheld;

F. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow Plaintiffs costs herein;

G. Grant additional or alternative relief as may seem to this Court to be just, proper, and equitable.

Respectfully submitted,

s/ Plaintiffs' Counsel

(Certificate of service omitted in printing)

On the 16th day of May, 1973, the following ORDER was filed in the United States District Court, Southern District of Iowa:

JANE DOE and JOAN ROE,

Plaintiffs,

v.

KEVIN J. BURNS, et al.,

Defendants.

ORDER

The Court has carefully reviewed the Complaint submitted on behalf of Jane Doe and Joan Roe and finds that the issues contained therein are identical to those in *Alcala v. Gillman*, Civil No. 73-86-2, and that Jane Doe and Joan Roe are probably members of the class on whose behalf Linda Alcala is suing in Civil No. 73-86-2.

Accordingly, IT IS ORDERED that the cause of action on behalf of Jane Doe and Joan Roe is consolidated for purposes of all further

proceedings relating to temporary injunctive relief or permanent injunctive relief with *Alcala v. Gillman*, Civil No. 73-86-2.

Dated: May 15, 1973.

s/ William C. Hanson

United States District Judge

On the 29th day of May, 1973, the following AMENDMENT TO ANSWER was filed in *Alcala* in the United States District Court, Southern District of Iowa:

(Title omitted in printing)

COME NOW the Defendants and Amends its Answer by adding the following paragraphs to its Answer, to wit:

1. That Plaintiff has failed to state the claim upon which relief can be granted;

2. That the Plaintiff in her Petition failed to present or state a substantial Federal question;

3. That there is other public relief available to Plaintiff to provide her with her nutritional needs and other necessities for her maintenance and health requirements;

4. That the doctrine of abstension is applicable.

WHEREFORE, Defendants PRAY that Plaintiff's Petition be dismissed at Plaintiff's cost.

s/ Defendants' Counsel

(Certificate of service omitted in printing)

On the 29th day of May, 1973, the following ANSWER was filed in *Doe and Roe* in the United States District Court, Southern District of Iowa:

(Title omitted in printing)

COME NOW the Defendants and for Answer to Plaintiffs' Complaint, state the following:

1. Defendants admit the allegations contained in paragraphs one (1), five (5), six (6), seven (7), eight (8), nine (9), ten (10), twelve (12), thirteen (13), fourteen (14), sixteen (16), eighteen (18), nineteen (19), twenty (20), and twenty-one (21);

2. Defendants also deny the allegations contained in paragraphs two (2), three (3), four (4), eleven (11), seventeen (17), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25) (a), twenty-five (25) (b), twenty-five (25) (c), twenty-five (25) (d), twenty-five (25) (e),

twenty-five (25) (f), and twenty-six (26);

3. Defendants are without sufficient knowledge as to the truth of the allegations contained in Paragraph fifteen (15) of Plaintiffs' Complaint and therefore deny the same.

4. That by way of affirmative defense, Defendants state that Plaintiffs have failed to state a claim upon which relief can be granted;

5. That by way of further affirmative defense, Defendants state that the Plaintiffs in their Petition failed to present or state a substantial Federal question;

6. That by way of further affirmative defense, Defendants state that there is other public relief available to Plaintiffs to provide them with their nutritional needs and other necessities for their maintenance and health requirements.

7. That the doctrine of abstention is applicable.

WHEREFORE, Defendants PRAY that Plaintiffs' Petition be dismissed at Plaintiffs' cost.

s/ Defendants' Counsel

(Certificate of service omitted in printing)

The evidence was stipulated between the parties as follows:

Plaintiffs' Exhibit 1, filed on the 29th day of May, 1973 in the United States District Court, Southern District of Iowa, reads as follows:

(Title omitted in printing)

The parties to the above-entitled action, by and through their attorneys, hereby agree and stipulate to the following:

1. That Plaintiff is twenty (20) years old and is unmarried.

2. Plaintiff is pregnant and her child is due in July, 1973.

3. If her child were born, Plaintiff would be eligible for AFDC assistance under her present financial condition.

4. Plaintiff has no current income and no savings.

s/Plaintiffs' Counsel s/ Defendants' Counsel

Over Defendants' objection as to relevancy and materiality, it was stipulated that if Dr. Roy M. Pitkin were called to testify he would testify as in Plaintiffs' Exhibit 2 which was filed on the 29th day of May, 1973 in the United States District Court, Southern District of Iowa:

(Title omitted in printing)

Come Now the parties to this action, by and through their attorneys, and stipulate that if Roy M. Pitkin, M.D. were called to testify

in the above-entitled action, his testimony would be as follows:

1. My name is Roy M. Pitkin.

2. I reside at 517 Templin Park, Iowa City, Iowa.

3. I am currently employed as a Professor in the Department of Obstetrics and Gynecology, College of Medicine, University of Iowa, Iowa City, Iowa.

4. My undergraduate education was as follows:

a. B.A (with highest distinction), University of Iowa, 1956.

5. I received my M.D. Degree from the University of Iowa in June, 1959.

6. I completed my internship at King County Hospital, Seattle, Washington, 1960; and my residency at the University of Iowa Hospitals, 1963.

7. I have been employed in my present capacity since September, 1968.

8. During my medical education and work experience, I have studied various areas associated with the development of the human fetus.

9. I hold the following positions:

a. Chairman, Committee on Nutrition, American College of Obstetricians and Gynecologists.

b. Member, Committee on Maternal Nutrition, National Academy of Sciences - National Research Council.

10. I am in full agreement with the "Policy Statement of Nutrition and Pregnancy" passed by the Executive Board of the American College of Obstetricians and Gynecologists on December 1, 1972.

11 In my opinion, a woman's nutrition during pregnancy is an important determinant of the health and condition of her child; if nutrition is inadequate, not only is her own health imperiled, but there is a substantial likelihood that the health of her child may be affected adversely, as a result of said inadequate nutrition.

12. Dietary intake during pregnancy (particularly calories and protein) is a major determinant of the weight of the child at birth.

13. Weight at birth is a strong indicator of subsequent course of the child, in terms of both survival and development.

14. Besides nutrition during pregnancy, a number of other factors affect the health of the child. These factors include the child's genetic make-up, the general health of the mother prior to and during pregnancy, and the presence or absence of complications of pregnancy.

15. A woman's pre-pregnancy nutritional status is an important determinant of the outcome of pregnancy. However, inadequate nutrition during pregnancy is likely to have an adverse effect on the health of the child, even if maternal health was good before pregnancy.

In addition, optimal nutrition during pregnancy in a woman of poor pre-pregnancy nutritional background may serve to ameliorate the negative effects of previous poor nutrition.

The parties further agree that this Stipulation is not an agreemtnt that this stipulated testimony is admissible into evidence and Defendants object to the admission of the same on the grounds of materiality and relevancy.

s/ Plaintiffs' Counsel s/ Defendants' Counsel

[The following was attached to the preceeding stipulation.]

POLICY STATEMENT ON NUTRITION AND PREGNANCY AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS

A woman's nutritional status before, during, and after pregnancy contributes to a significant degree to the well being of both herself and her infant. Therefore, what a woman consumes before she conceives and while she carries the fetus is of vital importance to the health of succeeding generations.

Nutritional assessment and advice are essential components of good antepartal care. The obstetrician-gynecologist, as leader of the obstetric-gynecologic health team, is responsible for including these in the care of all pregnant patients under his supervision. He may do this personnally or by insuring that qualified members of his team do so. Ideally, nutritional assessment should be made before conception. Failing that, it should be accomplished at the first antepartal visit. It should be repeated at regular intervals during the following pregnancy. A basic technique of nutritional assessment is to obtain and analyze a 24 or 48 hour diet history. This should be supplemented by clinical evaluation of possible nutritional deficiencies and, where indicated, appropriate laboratory tests.

Nutritional advice to the pregnant woman depends upon knowledge of sound nutritional principles. Although the components of optimal maternal diet have not been determined precisely, several important principles may be stated:

1. Adequate intake of protein, particularly protein from animal sources, should be insured.
2. Caloric intake approximately 10 per cent above non-pregnant requirements in advisable.
3. Weight gain during pregnancy should not be restricted unduly, nor should weight reduction normally be attempted. The average weight gain in normal pregnancy is 10 to 12 kg (22 to 27 lbs).

4. Essential nutritional elements (such as sodium) should not be restricted during normal pregnancy.
5. Dietary supplements of iron and iron-containing foods are indicated during pregnancy. Other dietary supplements, such as vitamins or additional sources, may be helpful where deficiencies in nutritional status are determined.

Nutritional advice should be continued during the puerperium. Restriction of dietary intake should not be advised during the early postpartal course nor for the lactating mother.

In implementing these principles of good nutrition in obstetrics, the obstetrician-gynecologist may utilize written or pictorial materials. However, the most important factor in persuading a patient to establish sound nutritional habits before, during, and after pregnancy is continued personal encouragement by the obstetrician-gynecologist and the members of his health team, with emphasis on positive rather than negative aspects of nutrition.

Passed by the Executive Board, December 1, 1972

Defendants' Exhibit A, which was filed on the 29th day of May, 1973, in the United States District Court, Southern District of Iowa, reads as follows:

(Title omitted in printing)

STATE OF IOWA

ss.

COUNTY OF POLK

I, Vernon W. Woodard, being first duly sworn on oath, state that I am Assistant Director of Food Stamp Program for the Iowa Department of Social Services, State of Iowa; that as such I am in charge of the official documents in this office;

That attached hereto, marked Exhibit A and by this reference made a part hereof consisting of 14 pages, are Xerox copies of the Federal Rules and Regulations as published in the Federal Register of January 18, 1969 (34 F.R. 807) together with instructions by the Federal agencies authorized to administer such programs in the State of Iowa;

That also attached hereto, marked Exhibit B and by this reference made a part hereof consisting of 7 pages, is a contract between the Iowa Department of Social Services and an agency of the Office of Economic Opportunities (O.E.O.) which administers this program in Scott County, Iowa; that said contract dated December 17, 1969 is currently in full force and effect and is part of the official records of the Iowa Department of Social Services;

That also attached hereto, marked Exhibit C and by this reference made a part hereof consisting of 3 pages, is a copy of the Rules and Regulations concerning the Food Stamp Program as published in the

Federal Register of July 29, 1971 (Vol. 36, No. 146); that said Food Stamp Program is in effect in every county in the State of Iowa including Scott County, Iowa, and is administered by the Iowa Department of Social Services through the county departments of social services;

That if I were called to testify in the above captioned matter, that my testimony would be as stated in this Affidavit.

s/ Vernon W. Woodard

(Duly verified)

[Attachment not printed but is in the Court file and either party may refer thereto by stipulation of parties.]

On the 1st day of June, 1973, filed as Exhibit "C" to Defendants' Supplemental Brief in the United States District Court, Southern District of Iowa, the official published and circulated manual material of the Iowa Department of Social Services, of which the Court may take judicial notice, which shows items considered in computing an ADC grant, is as follows:

EMPLOYEES' MANUAL V-Appendix - 14f

CHART FOR DETERMINING INCOME IN KIND: ADC

(All figures are on a per person basis.)

Number Of Persons Whose Needs Are Included In Computation Of Grant	* Shelter	* Utilities	* Supplies & Replacements	* Food	* Clothing	* Personal Care & Supplies	* Medicine Cabinet Supplies	* Communications
1	28.28	15.38	6.63	26.26	7.76	4.81	.92	9.44
2	19.43 x 2 etc.	9.86	3.74	24.07	7.76	4.81	.92	4.72
3	16.50 x 3 etc.	7.85	2.79	22.98	7.76	4.81	.92	3.14
4	14.17 x 4 etc.	6.66	2.31	21.89	7.76	4.81	.92	2.37
5	12.02 x 5 etc.	5.67	2.01	20.78	7.76	4.81	.92	1.89
6	10.60 x 6 etc.	4.92	1.82	19.69	7.76	4.81	.92	1.57
7	9.59 x 7 etc.	4.36	1.69	19.69	7.76	4.81	.92	1.35
8	8.84 x 8 etc.	3.94	1.58	19.69	7.76	4.81	.92	1.18
9 or more	8.12 x 9 or more etc.	3.63	1.50	19.69	7.76	4.81	.92	1.04

*amounts in these columns are to be multiplied by the numbers preceding each line

Iowa Department of Social Services Revised July 29, 1970

On the 31st day of July, 1973, the following FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT was filed by the United States District Court, Southern District of Iowa, and is published in 362 F.Supp. 180:

LINDA ALCALA, Individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Defendants.

Civil No. 73-86-2

JANE DOE and JOAN ROE,

Plaintiffs,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Defendants.

Civil No. 73-110-2

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

In these consolidated causes of action, brought pursuant to Title 42 U.S.C., Section 1983, the plaintiffs ask this Court to declare invalid, and enjoin defendants from continuing, acts by which defendants deny A.F.D.C. assistance to pregnant mothers and their unborn children. Defendants have denied A.F.D.C. assistance to these plaintiffs pursuant to their interpretation of an Iowa Department of Social Services regulation, such interpretation being that A.F.D.C. assistance is not available to otherwise eligible pregnant women whose children have not been born. The defendants claim that neigher the Federal statutes governing A.F.D.C. nor the Iowa Regulations contemplate A.F.D.C. payments for an unborn child.

On April 4, 1973, this Court entered a temporary restraining order enjoining the defendants from denying A.F.D.C. payments to Linda Alcala on the sole basis that her child was not yet born. On May 16, 1973, a similar action was filed by plaintiffs Jane Doe and Joan Roe. This cause of action was consolidated with *Alcala v. Gillman* and a temporary restraining order was issued restraining the defendants from denying A.F.D.C. payments to these plaintiffs on the sole basis that their children are not yet born.

On May 29, 1973, a trial was held to determine the issues in the above two causes of action. The following will constitute the Findings of Fact, Conclusions of Law, and Order for Judgment.

Jurisdiction of the Court is invoked pursuant to Title 42 U.S.C., Section 1983, Title 28 U.S.C., Section 2201, and Title 28 U.S.C., Section 1343.

Findings of Fact

1. The plaintiffs are unmarried pregnant women with unborn children, are currently unemployed, and have no savings.

2. The plaintiffs applied to the Scott County Department of Social Services for A.F.D.C. assistance, but were denied such assistance because of the Scott County Department's interpretation of Section V, Chapter 5 of the Iowa Department of Social Services Manual. As interpreted by the defendants, this provision does not provide for A.F.D.C. assistance to an otherwise eligible pregnant woman whose child is not yet born.

3. The plaintiffs met all eligibility requirements for A.F.D.C. assistance except that their children were not yet born.

4. Stipulated testimony of Dr. Roy M. Pitkin, obstetrician and gynecologist, (Plaintiffs' Exhibit 2) stated that the nutrition of a mother during pregnancy is an important determinant of the health and condition of the child and that there is a substantial likelihood that the health of a child may be adversely affected as a result of the pregnant mother's inadequate nutrition. He also stated that proper medical attention during pregnancy is important to protect the mother's health, which in turn affects the health and development of the child.

5. The defendants in this cause of action are Kevin J. Burns, Acting Director of the State of Iowa Department of Social Services, and Michael Ryan, Director of the Scott County Department of Social Services.

6. The Court finds that this is an appropriate class action under Rule 23 of the Federal Rules of Civil Procedure.

Conclusions of Law

The plaintiffs assert their right to A.F.D.C. payments on three theories. First, they allege that the defendants' interpretation of Iowa's A.F.D.C. provisions, which deny payments to otherwise eligible pregnant women whose children have not been born, conflicts with eligibility

provisions of Title 42 U.S.C., Section 606(a), and thus is invalid and unconstitutional under the Supremacy Clause. The second two theories allege that the actions of the defendants in denying A.F.D.C. payments and their interpretation of Title 42 U.S.C., Section 606(a), and the Employees Manual violate the plaintiffs' right to the due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. Because of the Court's holding upon the Supremacy Clause theory, it will not be necessary to reach the "equal protection" and "due process" arguments.

The Supremacy Clause Argument.

The plaintiffs claim that the term "dependent child" as defined in Section 406(a) of the Social Security Act, Title 42 U.S.C., Section 606(a)[1] encompasses an unborn child for purposes of determining eligibility for A.F.D.C. payments. They further argue that since a mother with an unborn child is eligible under the Federal statute, the states cannot pursue more restrictive eligibility requirements lest they be in violation of the Supremacy Clause.

The law concerning eligibility requirements for A.F.D.C. has been dealt with by a long line of recent Supreme Court decisions. *King v. Smith*, 392 U.S. 309 (1968); *Wyman v. James*, 400 U.S. 309 (1971); *Townsend v. Swank*, 404 U.S. 282 (1971); *Lewis v. Martin*, 397 U.S. 552 (1970); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dandridge v. Williams*, 397 U.S. 471 (1970).

Several propositions relevant to these causes of action become clear from the law stated in these opinions. *King v. Smith, supra*, in interpreting the effect of Section 402(a) of the Social Security Act, Title 42 U.S.C., Section 602(a),[2] held that the Social Security Act determined eligibility standards for A.F.D.C. and that state provisions which had the effect of narrowing those eligibility standards were to that extent invalid bacause of the Supremacy Clause.

Townsend v. Swank, supra, at 286 in interpreting the dictates of *King v. Smith* stated:

> "Thus *King v. Smith* established that, at least in the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance

[1]This Section provides "(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a parent, and who is living with his father, mother . . . and (2) who is (A) under the age of eighteen. . . ."

[2]This section provides that: "A State plan for aid and services to needy families with children must . . . (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness **to all eligible individuals.** . . ." (Emphasis added)

> under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that HEW regulations seem to imply that states may to some extent vary eligibility requirements from federal standards. However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of Section 402(a)(10) that aid be furnished to **all eligible individuals.**"

Carleson v. Remillard again reiterated the same proposition as the aforementioned cases in invalidating a California regulation which denied A.F.D.C. payments to otherwise eligible individuals on the basis that absence from home for military service did not constitute "absence from home" for purposes of satisfying A.F.D.C. eligibility requirements.

From *King, Townsend,* and *Remillard,* the following related principles have been set forth by the Supreme Court:

(1) The states may not impose more restrictive eligibility conditions for receiving A.F.D.C. than those set out in the Social Security Act;

(2) In order to exclude an applicant who would have been covered under the Social Security Act, the state must rely upon legislative history or statutory language "clearly evidencing" Congressional intent to allow the exclusion of the applicant;

(3) HEW regulations purporting to make eligibility for certain groups of applicants optional with the states are of no effect in the absence of Congressional intent to allow such exclusions.

Since there appears to be no convincing argument by the defendants that there is a specific Congressional exclusion or intent to allow the exclusion of unborn children and the Court can find no such intent, the Court's inquiry must be directed to whether the term "dependent child" in Title 42 U.S.C., Section 606(a) **includes** coverage for the "unborn child." If such coverage is in fact intended by the Social Security Act, the Court would be compelled under the precedents cited above to find for the plaintiffs.

The plaintiffs argue that the Social Security Act contemplates coverage for the "unborn child" when it provides coverage for a "dependent child." It is first contended that the plain language of the statute implies they are to be included and that there is no indication in the statutory language that mothers with unborn children are to be excluded from coverage. They point to the definition by Webster's New International Dictionary (Second Edition Unabridged) which defines "child" as: "An unborn or recently born human being; fetus; infant; baby. . . ." The defendants argue just as ardently that the clear language of the Social Security Act constantly refers to children in being and that nowhere is "unborn child" referred to. The defendants argue that the customary meaning of the word "child" is that of a born person.

In any event, the Court does not find this venture into the plain

meaning of the term "dependent child" extremely fruitful. It is obvious that the "plain language" of the statute is not as plain as both parties contend and is surely not conclusive for the plaintiffs or the defendants. It is ascertainable, however, that an "unborn child" is not specifically excluded by the language of the Act.

Given this ambiguity in the statute, the Congressional intent becomes more important and is a more fruitful inquiry. Title 42 U.S.C., Section 601 authorizes funds:

> "For the purpose of encouraging the care of dependent children in their homes . . . by enabling each state to furnish financial assistance and rehabilitation and other services as far as practicable under the conditions in each State, to needy dependent children and the parents or relatives with whom they are living to help maintain the strengthen family life and to help such parents . . . to attain self-support and personal independence consistent with the maintenance of continuing prenatal* care and protection. . . ."
>
> (Emphasis added).

Inclusion of the "unborn child" is consistent with the purposes of the Act above stated. The stipulated testimony of Dr. Roy Pitkin clearly states the additional needs of the child and mother during this prenatal period and the serious consequences that flow to the family if the nutritional and medical needs of the child are not met during this prenatal period. Meeting of these family needs is consistent with the purposes of the A.F.D.C. program stated above. As stated in *Carleson v. Remillard, supra,* at 604:

> "We cannot assume here, anymore than we could in *King v. Smith, supra,* that while Congress 'intended to provide programs for the economic security and protection of *all* children,' it also "intended arbitrarily to leave one class of destitute children entirely without meaningful protection."
> 392 U.S., at 330.

The term "dependent child" is broad enough to encompass an "unborn child" and the coverage for "unborn children" is consistent with the purposes of the Social Security Act. No credible argument can be made that Congress intended to exclude "unborn children" from coverage under this Act. Therefore the Court concludes that coverage for "unborn children" is contemplated by the Social Security Act.

This conclusion is strengthened by a reading of the relevant regulations of the Department of Health, Education and Welfare. The Code of Federal Regulations, 45 C.F.R., Section 233.90 provides that:

> "(c)(2) Federal financial participation is available in:
> . . .

*Word "prenatal" corrected as "parental" in Order Clarifying Misprint in Court's Order of July 31, 1973, filed in the United States District Court, Southern District of Iowa, on August 24, 1973 [p. 28 hereof], and published in corrected form at 362 F.Supp. 180 (S.D. Iowa 1973).

> (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis. . . ."

Since 1946 it has been the policy of HEW that payments are authorized on behalf of "unborn children." The position of HEW, as stated in their amicus brief filed by the defendants, is that Section 233.90(c)(2) is an optional program to the states and that just because these regulations **allow** coverage of unborn children does not dictate that coverage is required.

If, however, this so-called optional program of HEW is a valid program, the power to promulgate this Regulation would flow from the Social Security Act. As stated in the defendants' Brief on page 7:

> "However, it is equally clear that such regulations may not go beyond the limits of the Act or law on which such regulations are based. *Townsend v. Swank*, 404 U.S. 282 (1971)."

The fact that HEW has allowed payments to "unborn children" since 1946 under this Act and the fact that Congress has acquiesced in this position is a most convincing argument that the Social Security Act encompasses eligibility for the parent with an "unborn child." The Court again concludes that "unborn children" are eligible for A.F.D.C. benefits under the Social Security Act and that under the precedents of *King*, *Townsend* and *Remillard* and the Eighth Circuit cases of *Rosen v. Hursh*, 464 F.2d 731 (1972) and *Doe v. Gillman*, No. 72-1605 (8th Cir., June 6, 1973), the defendants cannot enforce more strict eligibility requirements than those requirements in the Federal statute.

> Lower Court Opinions Considering the Same Question Presented to this Court.

There are two United District Court cases reaching conflicting decisions in which the issue was whether a state regulation denying A.F.D.C. assistance to pregnant women and their unborn children solely on the basis that the children are unborn is inconsistent with the Social Security Act and therefore invalid under the Supremacy Clause. *Parks v. Harden*, 41 U.S.L.W. 2391 (N.D. Ga., Jan. 4, 1973) denied A.F.D.C. payments to the plaintiff. *Wilson v. Weaver*, No. 72-C-1960 (N.D. Ill., Dec. 26, 1972) (Order on preliminary injunction) found on the basis of the Supremacy Clause that the plaintiff in that cause of action was entitled to receive A.F.D.C. payments even though the child was not yet born.

The determining factor in the differing results that were reached is that Judge Smith in *Parks v. Harden*, when he searched the statute and legislative history, was looking for a very specific inclusion of "unborn children" which he did not find. Therefore he concluded that unborn children were not covered. This Court believes the proper approach is to look at the term "dependent child" and see whether it could be broad enough to include coverage for the "unborn child" in light of the overall purpose of the Act. This Court concludes, as did *Wilson v. Weaver*, that the term "dependent child" is broad enough to encompass an "unborn child" and that an interpretation of the Federal eligibility requirements

which includes coverage for "unborn children" is consistent with, and in furtherance of, the overall purpose of the A.F.D.C. provisions of the Social Security Act.

Parks v. Harden also accepted HEW's position that the "unborn children" program under their regulation, Title 45 C.F.R., Section 233.90(c)(2)(ii), is optional even given the language of *King, Townsend* and *Remillard*. The *Parks* opinion did not explain from where the authority for a so-called optional program was derived if such coverage was not comtemplated by the Social Security Act. The *Wilson v. Weaver* court found that the HEW regulation sappported the proposition that coverage for "unborn children" was contemplated by the Social Security Act and correctly concluded under the *King, Townsend* and *Remillard* cases that these federal eligibility standards can not be restricted by a State under the guise that the program is optional.

The Court now directs its attention to an unpersuasive but intriguing argument that asserting that an "unborn child" is a "dependent child" within the meaning of the Social Security Act is in total conflict with the abortion case, *Roe v. Wade*, 410 U.S. 113 (1973) which held that an "unborn child" is not a person within the protection of the Fourteenth Amendment. In this lawsuit the Court is determining whether Congress intended to provide for a mother and her "unborn child" under the A.F.D.C. provisions. The fact that a child is not protected as a person under the United States Constitution is not relevant to the above inquiry. The payments are made to the family and not the "unborn child" and the mother is asserting her right to payments.

The Abstention Argument.

The defendants argue that this Court should stay its hand pending the determination of these issues by the Iowa Court. *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Department of Social Services of Iowa v. Dimery*, 398 U.S. 322 (1970) and *Bascom and Hightower v. Perry*, Civil No. 72-C-524-EC are cited as authority for this proposition. In this case, however, we are determining the applicability of federal law. There is no determination of a State law involved. Abstention is not appropriate in these circumstances.

Order for Judgment

The final matter for this Court to determine is the relief to be granted to the plaintiffs and their class. The Court will grant the declaratory and injunctive relief prayed for, but will not allow the claims for retroactive payments wrongfully withheld. In *Doe v. Gillman*, No. 72-1605 (8th Cir., June 6, 1973), the Eighth Circuit refused to grant retroactive payments in circumstances involving wrongfully withheld A.F.D.C. payments on the basis that Section 53.16(217) of the 1973 Iowa Departmental Rules provided for retroactive payments and was thus the process that should be taken by the aggrieved plaintiffs.

> "When the hearing decision if favorable to the claimant, or when the agency decides in favor of a claimant prior to the hearing,

corrective payments, retroactive to the date of incorrect action, **shall** be made."
(Emphasis added).

Once the rights of these parties have been determined, this Court cannot presume that the Iowa officials will not follow their own designated procedure for awarding relief.

IT IS ORDERED that the above shall constitute the Findings of Fact, Conclusions of Law and Order for Judgment in the above entitled cause of action.

Dated: July 31, 1973.

BY THE COURT:

s/ William C. Hanson

Chief Judge,
Southern District of Iowa

On the 31st day of July, 1973, the following JUDGMENT was filed in the United States District Court, Southern District of Iowa:

LINDA ALCALA, Individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Defendants.

Civil No. 73-86-2

JANE DOE and JOAN ROE,

Plaintiffs,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Defendants.

Civil No. 73-110-2

JUDGMENT.

In accordance with the Findings of Fact, Conclusions of Law, and Order for Judgment filed contemporaneously with this Order,

IT IS ORDERED, ADJUDGED AND DECREED that the above causes of action are class actions on behalf of expectant mothers who are denied A.F.D.C. payments by reason of the defendants' interpretation of Title 42 U.S.C., Section 606(a) so as to not include an unborn child within the term "dependent child."

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants' actions in denying A.F.D.C. payments to these plaintiffs and the defendants' interpretation of their Employees Manual and Regulations to exclude from A.F.D.C. eligibility to otherwise eligible pregnant women on the basis that their child is not yet born, are invalid on the grounds that they conflict with Title 42 U.S.C., Section 606(a) and thus violate the Supremacy Clause of the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants are permanently enjoined from denying A.F.D.C. payments to a pregnant woman who is otherwise eligible for payments, on the sole basis that her child is not yet born.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the portion of the plaintiffs' complaints seeking retroactive payments is dismissed.

Dated: July 31, 1973.

s/ William C. Hanson

Chief Judge
Southern District of Iowa

On the 2nd day of August, 1973, the following NOTICE OF APPEAL was filed in the United States District Court, Southern District of Iowa:

(Title omitted in printing)

Notice is hereby given that Kevin J. Burns and Michael Ryan, Defendants named above, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the Order and Judgment issued in the above-named consolidated cases dated the 31st day of July, 1973, finding that the Defendants' interpretation of their Employees' Manual and Regulations conflict with Title 42 U.S.C. § 606(a) and thus violate the Supremacy Clause of the United States Constitution.

s/ Defendants' Counsel

(Certificate of service omitted in printing)

On the 9th day of August, 1973, the following RULING ON MOTION FOR STAY OF JUDGMENT was filed in the United States District Court, Southern District of Iowa:

LINDA ALCALA, Individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

KEVIN J. BURNS, et al.,

Defendants.

Civil No. 73-86-2

JANE DOE and JOAN ROE,

Plaintiffs,

vs.

KEVIN J. BURNS, et al.,

Defendants.

Civil No. 73-110-2

Ruling on Motion For Stay of Judgment

Application for stay of judgment pursuant to Rule 62(c) of the Federal Rules of Civil Procedure has been made in this cause. Careful attention has been given to the reasons urged on behalf of the application.

The Court notes the resistance to the application by the defendants.

A careful analysis relating to the principles for the granting of such an application clearly indicates that the application should be denied.

No one doubts that the moving party here in order to receive relief must show: (1) That it has a strong possibility and must make a strong showing that that party is likely to succeed on the merits on appeal; (2) That the applicant must establish that unless a stay order is granted he will suffer irreparable injury; (3) That the applicant must show that no substantial harm will come to the other interested parties, and (4) That if a stay would be granted it would not harm the public interest.

From the proof offered in this case in its main submission and from the findings made prior hereto, and from the subsequent disclosure to the Court that perhaps not many would be involved, and from a complete look as a balancing of all the factors hereinbefore mentioned, the Court can reach no other conclusion than that the application should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the application for stay of judgment be and the same is hereby denied.

s/ William C. Hanson

William C. Hanson, Chief Judge
United States District Court

On the 24th day of August, 1973, the following ORDER CLARIFYING MISPRINT IN COURT'S ORDER OF JULY 31, 1973 was filed in the United States District Court, Southern District of Iowa:

LINDA ALCALA, Individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Defendants.

Civil No. 73-86-2

JANE DOE and JOAN ROE,

Plaintiffs,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Defendants.

Civil No. 73-110-2

ORDER CLARIFYING MISPRINT IN COURT'S ORDER OF JULY 31, 1973.

The Court has before it a Motion for Clarification of Findings of Fact, Conclusions of Law and Order for Judgment filed August 24, 1973.

On page 6 of the Court's Order dated July 31, 1973, the Court quoted from Title 42 U.S.C., Section 601 as follows:

> "For the purpose of encouraging the care of dependent children in their homes . . . by enabling each state to furnish financial assistance and rehabilitation and other services as far as practicable under the conditions in each State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents . . . to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of *continuing prenatal care and protection. . . .*" (Emphasis added).

In the emphasized portion, a typographical error was made by typing "prenatal" instead of "parental." The Court now corrects that wording to read parental. This typographical error in no way affected the Conclusions of Law in this section or the ultimate outcome of this case. As stated in this section, the purpose of the A.F.D.C. program is to provide for "the maintenance of continuing *parental* care and protection."

IT IS ORDERED that the typographical error on page 6 of the Court's Findings of Fact, Conclusions of Law and Order for Judgment is amended to strike the word "prenatal" and add the word Parental. This change is consistent with the actual wording of Title 42 U.S.C., Section 601.

Dated: August 24, 1973.

s/ William C. Hanson

William C. Hanson,
United States District Court

On the 7th day of September, 1973, the following ORDER was filed in the United States Court of Appeals for the Eighth Circuit:

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

73-1595 September Term, 1972

LINDA ALCALA, Individually and on behalf of all other persons similarly situated,

Appelle,

vs.

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa, Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

JANE DOE and JOAN ROE,

Appellees,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Service,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

The court has carefully considered appellants' application for stay of judgment as amended together with appellees' memorandum in resistance to the application.

Being fully advised in the premises it is now here ordered that appellants' amended application for stay of judgment be, and it is hereby, denied in all respects.

September 7, 1973

On the 29th day of March, 1974, the OPINION of the United States Court of Appeals for the Eight Circuit was filed and is set out as Appendix A, Petition for Writ of Certiorari.

On the 29th day of March, 1974, the following JUDGEMENT was filed in the United States Court of Appeals for the Eighth Circuit:

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 73-1595 September Term, 1973

LINDA ALCALA, Individually and on behalf of all other persons similarly situated,

Appellee,

vs.

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa, Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Service,

Appellants.

JANE DOE and JOAN ROE,

Appellees,

vs.

KEVIN J. BURNS, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 29, 1974

On the 15th day of April, 1974, the ORDER [staying the mandate] of the United States Court of Appeals for the Eighth Circuit was filed and is set out as Appendix B, Petition for Writ of Certiorari.

Supreme Court, U. S.
FILED
MAY 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Kevin J. Burns, Commissioner, State of Iowa Department of Social Services, and Michael Ryan, Director of the Scott County Department of Social Services, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 29, 1974.

OPINION BELOW

The opinion of the Court of Appeals has not as yet been published, and it appears at Appendix A. (Appendix A-1 cites the opinion of the District Court with comment thereon.)

JURISDICTION

On the 29th day of March, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion and Judgment (see Appendix A). Upon a motion by Petitioners, a Stay of issuance of the mandate was granted on April 15, 1974, provided that within thirty (30) days there is filed with the Clerk of the Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, (See Appendix B) The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the policy of the State of Iowa, Department of Social Services, which denies Aid to Dependent Children Grants to an unborn child, conflict with the Social Security Act, thus contravening the Supremacy Clause of the United States Consitution?

2. Since the statutory language of Title 42 U.S.C. § 606 (a), which defines "dependent child", does not expressly provide that unborn children are included and the legislative history indicates that they are not included, can the Department of Health, Education and Welfare (HEW) or the judiciary mandate the states to include them?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The Supremacy Clause of the Constitution of the United States and the pertinent portions of the Social Security Act [42 U.S.C. § 602 (a) (10), 42 U.S.C. § 602 (a) (17) and 42 U.S.C. § 606 (a)] and federal regulations [45 C.F.R. § 233.10 (a) (1) (i), 45 C.F.R. § 233.90 (c) (2) (ii) and (c) (3)] are set forth in Appendix C.

STATEMENT OF THE CASE

The Respondents, Plaintiffs below, representing themselves and other pregnant women who are denied AFDC payments by reason of the interpretation by Petitioners, State of Iowa, of Title 42 U.S.C. § 606 (a) so as to not include an unborn child within the term "dependent child", sought a declaratory judgment that Petitioners' actions by reason of said interpretation were invalid as conflicting with the federal statute; Respondents further sought to enjoin the denial of AFDC payments on the basis above stated and sought retroactive monetary damages for assistance withheld.

Respondents also alleged violations of their due process and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution and jurisdiction of the District Court was invoked pursuant to Title 42 U.S.C. §1983, Title 28 U.S.C. §2201, and Title 28 U.S.C. §1343. The District and Circuit Courts found it unnecessary to reach the due process and equal protection issues.

None of the named Respondents had living children but all three were pregnant. All three applied for AFDC to the County Director of Social Services of Scott County, Iowa, as residents of that county and were rejected. Their financial circumstances were such that had their child or children been born, a grant under Iowa's Aid to Dependent Children statute would have been approved. (Stipulated evidence)

The Circuit Court affirmed the decision of the United States District Court for the Southern District of Iowa, that unborn children were eligible under the Social Security Act to receive AFDC grants and that Iowa's exclusion violated the Supremacy Clause. (The judgment of the District Court had been stayed by the United States Supreme Court pending hearing by the Circuit Court by Stay Order, dated October 9, 1973, indexed in Application A-288.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE CIRCUIT COURT CONSTITUTES AN UNWARRANTED EXTENSION OF PREVIOUS SUPREME COURT DECISIONS AND CONFLICTS IN PRINCIPLE WITH *NEW YORK DEPARTMENT OF SOCIAL SERVICES V. DUBLINO*, 413 U.S. 405 (1973). [SEE ALSO *JEFFERSON V. HACKNEY*, 406 U.S. 535 (1972).]

II. THIS CASE RAISES ISSUES OF NATIONWIDE CONCERN ON WHICH THE FEDERAL COURTS IN VARIOUS SOVEREIGN STATES HAVE REACHED OPPOSITE RESULTS IN THE DEFINITION OF "DEPENDENT CHILD" UNDER TITLE 42 U.S.C. § 606 (a).

III. THIS CASE RAISES A SIGNIFICANT CHALLENGE TO THE PRINCIPLE OF "COOPERATIVE FEDERALISM" WHICH UNDERSCORES THE AFDC PROGRAM AND THE CASE THUS IS OF CONCERN TO ALL OF THE SOVEREIGN STATES.

IV. THE DECISION OF THE CIRCUIT COURT RAISES IMPORTANT QUESTIONS AS TO THE ADMINISTRATIVE AUTHORITY OF HEW IN THAT IT ERRONEOUSLY LIMITS AUTHORITY TO ALLOW THE STATES OPTIONAL EXTENSION OF BENEFITS UNDER AN ELIGIBILITY PROVISION THAT IS UNCLEAR AND SUSCEPTIBLE OF DIFFERING INTERPRETATIONS, AND, IN DOING SO, EFFECTIVELY GIVES HEW QUASI-LEGISLATIVE AUTHORITY WHICH IT DOES NOT POSSESS.

The decision below denies the authority of the Department of Health, Education and Welfare to allow states optional participation

in extending AFDC benefits to unborn children, and moreover, changes HEW regulations which for over 30 years merely allowed such option, into a mandatory eligibility requirement for state participation in the AFDC program. As the Circuit Court noted, 19 jurisdictions presently elect to pay benefits to unborn children, while 35 jurisdictions, including Iowa, do not.

In seventeen (17) different States, the question here is before the courts at varying stages of proceedings. (One state has four cases). The two cases listed by the Circuit Court in its decision, *Tapia v. Vowell,* Civil No. 73-B-169 (S.D. Texas, November 14, 1973) and *Tillman v. Endsley,* No. 73-1476-Civ-CF (S.D. Florida, October 1, 1973) stated by the court to have ruled that an unborn child is not a "dependent child", have not as yet been heard on the merits although preliminary injunctions were granted.

Thus, as of the date of the opinion of the Circuit Court, there were three (3) Federal District Courts which held on the merits the unborn were not included in the definition of "dependent child" and one circuit and only ten (10) (not twelve) which held they were included.

Three other pending cases not mentioned are, to-wit: *Adams v. Huecker,* third party complaint, *vs. Weinberger,* No. 78-15-B (W.D. Ken.); *Morris v. Huston,* No. G-250-73CA5 (W.D. Mich.); *Gann v. Friend,* No. CA-725-6 (M.D. Tenn.)

Interestingly enough, in *Adams,* a third party complaint has been filed against the Secretary of HEW challenging the authority of HEW to allow the states to include the unborn child by offering federal financial participation.

Since the Circuit Court decision, two more cases have been decided which hold that the unborn are not eligible for an AFDC grant, to-wit: *Poole v. Endsley,* No. 74-22 (N.D. Florida); *Geissler v. Endlsey,* No. 74-3 (N.D. Florida).

Aside from the financial interest of the various states, or of individual recipients in terms of possible lower benefits, the principle

of cooperative federalism which theoretically gives the states considerable latitude in allocating their AFDC resources is seriously eroded. 45 C.F.R. § 233.10 (a) (1) (i) (See Appendix C, infra); *Jefferson v. Hackney,* 406 U.S. 535 (1972); *Wyman v. James,* 400 U.S. 309 (1971). The upshot of the Circuit Court's decision is that broadest possible coverage of an eligibility provision, no matter how ambiguous and unclear the provision, becomes mandatory on all of the states wishing to participate in the AFDC program, when the coverage is not clearly inconsistent with the Social Security Act.

The decision below purports to rest on a now familiar triad of Supreme Court cases which "establish that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." *Townsend v. Swank,* 404 U.S. 282, 286 (1971). See *King v. Smith,* 392 U.S. 309 (1968); *Carleson v. Remillard,* 406 U.S. 598 (1972).

Petitioners contend that the decision below is an unreasonable extension of the dicta of *King-Townsend-Remillard, supra,* and is in conflict with the Supreme Court's clarification of the triad in *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973), which states at 93 S.Ct. 2517: "in those cases it was clear that state law excluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible . . . ." [Emphasis supplied]

The Circuit Court's decision also placed in jeopardy the language of this Court in Footnote 29, *Dublino* (1973) supra, reading:

> ". . . and 'so long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them. *Jefferson,* supra, at 541."

The express eligibility provision in all three cases was readily apparent either on the face of the statute or from the legislative history of the Act, or both. *King v. Smith* involved the Alabama "substitute father" regulation which dealt with the "parent" in 42 U.S.C. 606 (a). The Court found that the purpose of the regulation was inconsistent with the Act as amended, 392 U.S. 309, at 321-327, and that the legislative purpose and history of the AFDC provisions precluded the extended definition of "parent" to include male paramours with no legal duty of support. *Id.* at 327-330. Significantly, the Court also used other provisions of the Act to determine the meaning of "parent". *Id.* at 330-333.

Townsend v. Swank involved an Illinois statute and regulation which denied benefits to 18-20 year old dependents attending a college or university; this exclusion was in direct contravention of the express wording of 42 U.S.C. 606 (a) (2) (B), and the Court found no congressional authorization for the States, or HEW, to exclude college or university students. The Court also found direct legislative history contrary to the exclusion involved. 404 U.S. 282, at 287-291.

Finally, *Carleson v. Remillard* involved the California exclusion of "absence by reason of military service" from the definition of "continued absence" in 42 U.S.C. 606 (a). HEW regulations defined "continued absence" as absence for any reason, where the known or indefinite duration of absence interrupts or terminates the parent's functioning as a provider of care. 45 C.F.R. § 233.90 (c) (1) (iii). HEW acquiesced in the California exclusion by approving the State Plan, and urged to the Court that their regulation merely defined the outer limits of "continued absence" and the States had the option to define the concept more narrowly, but in a reasonable manner. The Court stated at 406 U.S. 602, "Our diffficulty with that position is that 'continued absence from the home' accurately describes a parent on active military duty." Moreover, legislative history and purpose

and other judicial comments concerning the status of "military orphans", were clearly contrary to the exclusion. The true holding in *Remillard,* as made clear in *Dublino,* supra, is that where the federal statute clearly and expressly makes an individual eligible, neither the states nor HEW may exclude such individual unless there is clear congressional authority to vary the eligibility standards.

In the instant case, the courts below have found that neither the statute itself, nor legislative history are at all helpful in determining whether unborn children are included in "dependent children" of § 606 (a). Thus, the *King-Townsend-Remillard* triad, as clarified by *Dublino,* are not on point with the instant case. Petitioners throughout the proceedings have pointed to various indications that unborn children were not required to be brought within the ambit of "dependent children". The statutory provision with which the Iowa policy has been held to be in conflict, 42 U.S.C. 602 (a) (10) refers to eligible *individuals.* The plain meaning of "children" does not include unborn children, and various statutory provisions relating to the AFDC program, and which clearly refer to born children, have been cited to demonstrate Congressional intent. [42 U.S.C. § 602 (a) (17); 42 U.S.C. § 602 (b) (now obsolete by judicial doctrine of "right to travel").] Moreover, this Court has commented extensively on the lack of rights of an unborn fetus, with respect to both constitutional protection and other legal rights. *Roe v. Wade,* 35 L.Ed.2d 147 (1974). Available legislative history also supports the right of the states, at their option, to exclude the unborn from the AFDC program[1], and original legislative history indicates that

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[1] House Ways and Means Committee on H.R. 1, Rep. No. 92-231, at 184, and Senate Finance Committee Report, Sen. Rep. No. 92-1230, at 108, indicate that Congress recognized that HEW allowed states to provide such benefits at their option. Proposed amendments which would exclude unborn children were not enacted, but Congress did not disapprove of the practice under 45 C.F.R. § 233.90 (c) (2) (ii) and (c) (3) of the states choosing to so extend benefits or not.

congress never intended that the unborn were to be included within the AFDC program.[2] Finally, HEW, the federal agency charged with administering AFDC, views its regulations which allow payments to unborn children as merely statements of the availability of federal financial participation, rather than mandatory eligibility requirements. See *Parks v. Harden,* 354 F.Supp. 620 (N.D. Ga. 1973).

With respect to the equities inherent in a case of this nature, Petitioners point out that the question here is not whether the unborn ought to receive nutritional and medical assistance from society, but whether the States are required to provide such assistance through the AFDC program. The Circuit Court overlooked alternative programs cited by Petitioners, which are available to meet these needs, including food stamps, commodities, and general relief. Title V of the Social Security Act--Maternal and Child Welfare--is another source of assistance to the unborn. (Title V is totally separate from the AFDC program, Title IV of the Social Security Act.)

In the context of this case, where an ambiguous and unclear legislative provision has been interpreted by the agency charged with administration of the program, the authority of the agency to allow states the option of paying assistance to unborn children without fear of losing federal financial participation, but not require the states to pay benefits to unborn children, is supported by judicial doctrine. See *Rosado v. Wyman,* 397 U.S. 397 (1970); *Shea v. Vialpando,* _____U.S. ___, FN 11, reported at 42 U.S. L.W. 4559

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[2]See *Parks v. Harden,* 354 F.Supp. 620, 624 (N.D. Ga. 1973). E.g., Congressional Record, Vol. 79, Part 13, August 20, 1935, 74th Congress, 1st Session, at p. 13881: " . . . children who have lived at least 1 year in the State . . . and who were born within the State . . ."; *Id.*, Part 7, May 20, 1935, Joint Session, at p. 7838: " . . . from the time of birth until the time of death . . ."; *Id.,* at 7839: " . . . from his cradle to his grave; . . ."; *Id.,* at 7840: " . . . from birth to death . . ."; Congressional Record, Vol. 113, Part 17, August 17, 1967, 90th Congress, 1st Session, at 23053: " . . . child population . . .".

(April 23, 1974). On the other hand, the authority of the agency to legislate by extending a statutory definition is questionable and doubtless would have been challenged long ago if 45 C.F.R. 233.90 (c) (2) (ii) had been promulgated as a mandatory regulation.

CONCLUSION

Congress did not expressly mandate AFDC coverage of unborn children in the Social Security Act, Title 42 U.S.C. § 601 et seq., and the court erred in legislating such coverage.

Petitioners request that this Honorable Court grant the Writ herein sought and review and correct the decision of the Circuit Court for settlement of the problem for Iowa and the other sovereign states of the United States.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

LORNA LAWHEAD WILLIAMS
Special Assistant
Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 73-1595

Linda Alcala, Individually and on behalf of all other persons similarly situated,

Appellee,

v.

Kevin J. Burns, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and

Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Jane Doe and Joan Roe,

Appellees,

v.

Kevin J. Burns, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and

Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 15, 1974
Filed: March 29, 1974

Before MATTHES, Senior Circuit Judge, HEANEY, Circuit Judge, and TALBOT SMITH, Senior District Judge.*

MATTHES, Senior Circuit Judge.

This appeal presents the question, much litigated in the district courts recently, whether an unborn child is a "dependent child" within the meaning of § 406 (a) of the Social Security Act, 42 U.S.C. § 606 (a), thus entitling the expectant mother to receive Aid to Families with Dependent Children (AFDC).

Defendants-appellants, Kevin J. Burns, Acting Commissioner of the State of Iowa Department of Social Services, and Michael Ryan, Director of the Scott County Department of Social Services, acting pursuant to their interpretation of the Employees Manual of the Iowa Department of Social Services, denied such assistance to plaintiffs-appellees, who at the time of application were pregnant and who admittedly would become eligible for benefits once their children were born. Upon denial of benefits, plaintiffs brought this class action in the United States District Court for the Southern District of Iowa charging that defendants' actions violated the Equal Protection and Due Process Clauses of the United States Constitution, and, because inconsistent with § 406 (a) of the Social Security Act, 42 U.S.C. § 606 (a), also violated the Supremacy Clause. Plaintiffs sought declaratory and injunctive relief, and monetary damages for assistance wrongfully withheld.

Following a hearing, the district court filed findings of fact and conclusions of law. *Alcala v. Burns*, 362 F.Supp. 180 (S.D. Iowa 1973). Formal judgment was entered adjudging invalid defendants'

*Hon. Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

denial of AFDC payments to plaintiffs and permanently enjoining defendants from further denying AFDC payments to pregnant women who are otherwise qualified for such payments. Defendants have appealed.

I.

As a preliminary matter, we wish to clarify the basis for jurisdiction in the district court, although no question as to jurisdiction has been raised by the parties on appeal. *See United States v. Redstone,* 488 F.2d 300, 301 (8th Cir. 1973); *Williams v. Rogers,* 449 F.2d 513, 517 (8th Cir. 1971), *cert. denied,* 405 U.S. 926 (1972). As was the case in *Doe v. Lukhard,*____ F.2d____ (4th Cir., Feb. 26, 1974), to our knowledge the initial circuit case to decide the "unborn child" question, plaintiffs here alleged a colorable claim of denial of equal protection within the scope of § 1983 and its jurisdictional counterpart, § 1343 (3), and, accordingly, the district court possessed pendent jurisdiction of the Supremacy Clause claim. Further, whether or not a three-judge court would have been required to determine the constitutionality of defendants' interpretation of the welfare manual, *see Doe v. Lukhard, supra* at n.4, a three-judge court is clearly not required to determine whether that interpretation conflicts with the Social Security Act. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

II.

The Social Security Act requires that "aid to families with dependent children * * * be furnished * * * to all eligible individuals * * *." 42 U.S.C. § 602 (a) (10).

A triad of Supreme Court cases "establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is

therefore invalid under the Supremacy Clause." *Townsend v. Swank*, 404 U.S. 282, 286 (1971). *See King v. Smith*, 392 U.S. 309 (1968); *Carleson v. Remillard*, 406 U.S. 598 (1972).

If the *King, Townsend* and *Remillard* cases are to govern, it must first be determined that unborn children are "eligible," that is, that they are "dependent children" within the protection of the Act. On this point the courts have differed. Three district courts have ruled that an unborn child is not a "dependent child." *Mixon v. Keller*, No. 74-111-Civ-J-T (M.D. Fla., March 1, 1974); *Murrow v. Clifford*, Civ. No. 114-73 (D.N.J., June 12, 1973); *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973) (appeal pending Fifth Circuit). One circuit court and twelve districts courts, including the court below, have decided that an unborn child is a "dependent child." *Doe v Lukhard, supra, aff'g* 363 F.Supp. 823 (E.D. Va. 1973); *Wisdom v. Norton*, Civ. No. 15906 (D. Conn., Jan. 3, 1974); *Stuart v. Canary*, No. C 72-452 (N.D. Ohio, Dec. 27, 1973); *Whitfield v. Minter*, 368 F.Supp. 798 (D. Mass. 1973); *Carver v. Hooker*, Civ. No. 73-87 (D. N.H., Nov. 30, 1973); *Tapia v. Vowell*, Civ. No. 73-B-169 (S.D. Texas, Nov. 14, 1973) (Preliminary injunction granted pending decision of *Parks v. Harden* by the Fifth Circuit); *Tillman v. Endsley*, No. 73-1476-Civ-CF (S.D. Fla., Oct. 1, 1973); *Jones v. Graham*, Civ. No. 73-L-235 (D.Neb., Sept. 5, 1973); *Green v. Stanton*, 364 F.Supp. 123 (N.D. Ind. 1973); *Harris v. Mississippi State Dept. of Public Welfare*, 363 F.Supp. 1293 (N.D. Miss. 1973); *Alcala v. Burns, supra; Wilson v. Weaver*, 358 F.Supp. 1147 (N.D. Ill. 1972). Courts on both sides of the question have looked to the plain meaning of the word "child" and reached opposite results. The Act itself and the legislative history are unhelpful. Of some note are the Department of Health, Education and Welfare (HEW) regulations implementing the Act which provide: "Federal financial participation is available in: * * * (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis * * *." 45 C.F.R. § 233.90 (c) (2). The regulations further

provide: "Federal financial participation * * * is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of * * * pregnancy of a mother." 45 C.F.R. § 233.90 (c) (3). HEW, however, takes the position that these regulations merely extend an option to the state of including unborn children within its plan and do not mandate such coverage. In fact, as of 1971, 18 states and the District of Columbia furnished AFDC benefits to unborn children, while 34 states and Puerto Rico did not. Brief for HEW as Amicus Curiae, Appendix B, *Murrow v. Clifford, supra.*

We seriously question the right of HEW, as opposed to the unquestioned right of Congress, to decide what benefits are optional. Clearly Congress possesses, and has exercised in the past, the power to give individual states an option to exclude children eligible under the federal standards. *See Townsend v. Swank, supra* at 287-89 and n.5. But there is no indication that Congress has so acted with respect to unborn children.

We ask, as did the district court, from whence can HEW have derived the authority to bestow benefits, albeit supposedly optional benefits, upon unborn children if not from the eligibility provisons of the Social Security Act? We are inclined, in this respect, to accord substantial weight to HEW's understanding, implicit in the regulations, that unborn children are eligible. On the other hand, we are not permitted to defer to the agency's practice of making benefits to eligible persons optional. *Townsend v. Swank, supra* at 286.

We believe that the district court correctly concluded that the term "dependent child" is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act. The *King, Townsend* and *Remillard* cases, then, determine that defendants' interpretation of the welfare manual, denying benefits to unborn children and their mothers, violates the

Supremacy Clause and is invalid.

III.

Although granting declaratory and injunctive relief, the district court refused to order retroactive payment of benefits, citing our case of *Doe v. Gillman*, 479 F.2d 646, 649 (8th Cir. 1973), *petition for cert. filed sub nom. Burns v. Doe*, 42 U.S.L.W. 3205 (U.S. Nov. 5, 1973) (No. 73-406), which avoided deciding whether the Eleventh Amendment prohibits retroactive payments by presuming that the Iowa welfare officials would follow their own regulations which, in the court's view, provided for retroactive payments. Now appellants request this court to decide directly the Eleventh Amendment question. We have already done so in *Anderson v. Graham*, _____ F.2d _____ (8th Cir., Dec. 20, 1973), holding that "the Eleventh Amendment deprives the federal court of jurisdiction to award a money judgment against the State for * * * retroactive [AFDC] payments * * *."

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX A—1

The District Court opinion and judgment is reported at 362 F.Supp. 180 (S.D. Ia. 1973). The Order, as originally filed, misquoted the Social Security Act. The Court underscored and misquoted the crucial word "prenatal" for the correct word "parental". [Title 42 U.S.C. § 601] A correcting order was filed after Notice of Appeal was filed and prior to publication in the Federal Reporter.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 73-1595

Linda Alcala, etc., Appellee, vs. Kevin J. Burns, etc., et al., Appellants. Jane Doe and Joan Roe, Appellees, vs. Kevin J. Burns, etc., et al., Appellants.	)	September Term, 1973 Appeal from the United States District Court for the Southern District of Iowa.

On Consideration of the motion of the appellants for a stay of mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court, otherwise the mandate of this Court shall issue.

April 15, 1974

APPENDIX C

Constitution of the United States, Article VI, second paragraph:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Title 42 U.S.C. § 602 (a) (10) and (17):

> "(a) A State plan for aid and services to needy families with children must . . . (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals; . . . (17) provide –
>
> "(A) for the development and implementation of a program under which the State agency will undertake –
>
> "(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, . . ."

Title 42 U.S.C. § 606 (a):

> "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of

residence maintained by one or more of such relatives as his or their own home and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;"

45 C.F.R. § 233.10 (a) (1) (i):

"(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

"(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. Under this requirement:

"(i) States have substantial latitude and corresponding responsibility for determining the coverage, nature and scope of their public assistance programs. Although the public assistance titles define the coverage in which the Federal Government will participate financially, a State may provide coverage on a broader or more limited basis. However, it may not impose any eligibility condition that is prohibited under the Social Security Act."

45 C.F.R. § 233.90 (c) (2):

"Federal financial participation is available in:

* * *

"(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;"

45 C.F.R. § 233.90 (c) (3):

> "Federal financial participation (at the 50 percent rate) is available in any expense incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine . . . pregnancy of a mother."

APPENDIX D

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974
NO.

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, Lorna Lawhead Williams, Special Assistant Attorney General for the State of Iowa, hereby certify that on this day of May, 1974, three (3) copies of the Petition For A Writ of Certiorari were mailed, correct postage prepaid, to:

Mr. Robert Bartels
College of Law
University of Iowa
Iowa City, Iowa 52242
Counsel for Respondents

I further certify that all parties required to be served have been served.

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Counsel for Petitioners

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

BRIEF OF THE STATE OF ARIZONA AMICUS CURIAE IN SUPPORT OF PETITION

N. WARNER LEE
The Attorney General

PETER SOWNIE
Assistant Attorney General
1717 West Jefferson
Phoenix, Arizona 85007

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The State of Arizona, as amicus curiae, respectfully supports the petition of KEVIN J. BURNS, Commissioner of the State of Iowa, Department of Social Services; and MICHAEL RYAN, Director of the Scott County, Department of Social Services, praying that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit. For Opinions Below, Jurisdiction, Questions Presented, Constitutional and Statutory Provisions and Regulations involved and Statement of the case, see the petition.

STATEMENT OF THE INTEREST OF THE STATE OF ARIZONA

The State of Arizona participates in the Aid to Families with Dependent Children Program (hereinafter called "AFDC"). The Arizona Department of Economic Security has a policy not to grant AFDC benefits to a pregnant woman for the fetus and the would-be mother until the actual birth of the child.

Claiming that the actions of the defendants violate the Supremacy Clause and federal statutory law in that they have restricted eligibility for AFDC benefits to exclude persons eligible under federal statutes and regulations, namely, 42 U.S.C. 606 (a), and 45 C.F.R. § 233.90 (c) (2) (ii), a complaint with accompanying

Motions to proceed in Forma Pauperis, for Temporary Restraining Order and for Class Action was filed in the United States District Court for the District of Arizona against the Arizona Department of Economic Security, Janice Fitzgerald, et al v Mayo, et al, Civ. 74-124 Tuc.

The District Court of Arizona, on the 29th day of July, 1974, ordered that Defendants be restrained and enjoined from denying the AFDC application of Plaintiffs, Fitzgerald and Lopez and the class they represent of persons similarly situated solely because the applicant's child is not yet born, and further ordered that Defendant, William J. Mayo, Director of the Arizona Department of Economic Security, shall direct all Districts of the Arizona

Department of Economic Security to consider all unborn children as children for AFDC purposes as of the date pregnancy has been medically determined. The preliminary injunction to be in full force and effect until such time as the case may be heard and determined on the merits.

An appeal was taken to the Ninth Circuit Court of Appeals, No. 74-2637 where on the 20th day of September, 1974, a Stay was obtained pending appeal insofar as it applied to the Plaintiff-Appellee class other than the two-named Plaintiffs. Defendants-Appellants' Opening Brief for the appeal was filed on the 16th day of October, 1974.

Arizona is vitally interested in the

health, care and well-being of pregnant women and in alleviating the mortality rate of infants and mothers as well as the prevention of malnourishment and mental retardment of children. As pointed out in the argument, Arizona has several programs devoted to this field. Arizona is very much concerned over being ordered to make additional assistance payments in the AFDC program when it has provided other programs to take care of the problem. Thus the State of Arizona has a paramount interest in the determination by this Court on the Petition for Certiorari filed in this action. Arizona supports the Petition.

ARGUMENT

THAT THE STATES ARE NOT REQUIRED TO PROVIDE ASSISTANCE PAYMENT BENEFITS FOR THE UNBORN THROUGH THE AFDC PROGRAM IS DEMONSTRATED BY THE ENACTMENT BY CONGRESS OF PROGRAMS TO ALLEVIATE THE PLIGHT OF THE PREGNANT WOMAN AND THE UNBORN CHILD BY PROVIDING NUTRITIONAL ASSISTANCE.

Arizona supports the following arguments made by Petitioner that:

"...The decision below denies the authority of the Department of Health, Education and Welfare to allow states optional participation in extending AFDC benefits to unborn children, and moreover, changes HEW regulations which for over

30 years merely allowed such option, into a mandatory eligibility requirement for state participation in the AFDC program. As the Circuit Court noted, 19 jurisdictions presently elect to pay benefits to unborn children, while 35 jurisdictions, including Iowa do not." (Pet. pp 4-5).

"With respect to the equities inherent in a case of this nature, Petitioners point out that the question here is not whether the unborn ought to receive nutritional and medical assistance from society, but whether the States are required to provide such assistance through the AFDC program. The Circuit Court overlooked alternative programs cited by Petitioners, which are available to meet these needs, including food stamps, commodities, and general relief. Title V of the Social Security Act-

Maternal and Child Welfare--is another source of assistance to the unborn. (Title V is totally separate from the AFDC program, Title IV of the Social Security Act.)" (Pet. p. 9).

That the States are not required to provide such assistance payments for the unborn through the AFDC program is further demonstrated by the fact that Congress added to the Child Nutrition Act of 1966, Pub. L. 89-642, Oct. 11, 1966, 80 Stat. 885, a new Section 17, Pub. L. 92-433, §9, Sept. 26, 1972, 86 Stat. 729, 42 U.S.C. 1786, Special Supplemental Food Program for Women, Infants and Children (WIC Program) Appendix A.

To further bolster the program, the latest amendment, Public Law 93-326, effective June 30, 1974, increased the annual

appropriation from $40,000,000 to $100,000,000. Appendix B. page three.

If Arizona had to pay for the pregnant women and the unborn children in the AFDC Program an estimate of the cost for the fiscal year of 1975 would total $718,500.00 in State and Federal funds.

The Arizona State Department of Health Services for the fiscal year of 1975 will administer the WIC program of wholly federal grants in the total amount of $2.732,800.00.

Here would be a definite duplication of grants for the identical purpose to provide for the health and well being of the pregnant women and children to be born in supplying their nutritional needs. Not only would the pregnant women have their nutritional needs taken care of in the WIC program, but,

putting them and the unborn on the AFDC rolls would give the pregnant women additional welfare funds.

Arizona began implementing the WIC Program in January, 1974, in the largest populated county, Maricopa, and several other counties and several of the larger Indian Reservations. Pima County, containing Tucson, the second largest city in Arizona, began the program in May, 1974. At present all but two counties are included in the program.

The program is administered by the Arizona State Department of Health Services, pursuant to the following regulations: 7 C.F.R. 246. (Added) July 13, 1973; 7 C.F.R. 246.4 (Revised) March 11, 1974; and 7 C.F.R. 246.1 (a), (Amended) July 1, 1974.

This Department also administers Title V of the Social Security Act §501, et seq. (codified as 42 U.S.C. 701 et seq.) Maternal and Child Health and Crippled Children's Services.

In addition to all the foregoing services indigent pregnant women not receiving AFDC benefits are entitled for the third trimester of pregnancy to General Assistance benefits, which are wholly state funded. If serious medical problems exist General Assistance is provided at any stage of pregnancy. Thus, with the pregnant women with children already on the AFDC rolls, all eligible pregnant women are able to receive food stamps, medical assistance and hospitalization.

With such concern by Congress over the circumstances of indigent pregnant

women especially in the problem of properly meeting the pregnant woman's nutritional needs it can be seen that Congress did not intend to include the "unborn child" in the AFDC program but attempts to meet the problem by other programs.

CONCLUSION

Amicus request that this Honorable Court review and correct the decision of the Circuit Court for settlement of the problem in Iowa, Arizona and the other sovereign states of the United States.

Respectfully submitted:

N. WARNER LEE
The Attorney General

PETER SOWNIE
Assistant Attorney General

APPENDIX "A"

CHAPTER 13A.—CHILD NUTRITION

Sec.

1786. Special supplemental food program [New]
(a) Cash grants to state health departments, Indians, and other agencies for supplemental food to pregnant and lactating women and infants.
(b) Authorization of appropriations.
(c) Limitation of administrative costs.
(d) Determination of eligibility
(e) Medical records; reports to Congress.
(f) Definitions.

§ 1786. Special supplemental food program—Cash grants to state health departments, Indians, and other agencies for supplemental food to pregnant and lactating women and infants.

(a) During each of the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, the Secretary shall make cash grants to the health department or comparable agency of each State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare for the purpose of providing funds to local health or welfare agencies or private nonprofit agencies of such State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare serving local health or welfare needs to enable such agencies to carry out a program under which supplemental foods will be made available to pregnant or lactating women and to infants determined by competent professionals to be nutritional risks because of inadequate nutrition and inadequate income. Such program shall be operated for a three-year period and may be carried out in any area of the United States without regard to whether a food stamp program or a direct food distribution program is in effect in such area.

Authorization of appropriations

(b) In order to carry out the program provided for under subsection (a) of this section during the fiscal year ending June 30, 1973, the Secretary shall use $20,000,000 out of

funds appropriated by section 612c of Title 7. In order to carry out such program during the fiscal year ending June 30, 1974, there is authorized to be appropriated the sum of $20,000,000, but in the event that such sum has not been appropriated for such purpose by August 1, 1973, the Secretary shall use $20,000,000, or, if any amount has been appropriated for such program, the difference, if any, between the amount directly appropriated for such purpose and $20,000,000, out of funds appropriated by section 612c of Title 7. In order to carry out such program during the fiscal year ending June 30, 1975, there is authorized to be appropriated the sum of $40,000,000, but in the event that such sum has not been appropriated for such purpose by August 1, 1974, the Secretary shall use $40,000,000, or, if any amount has been appropriated for such program, the difference, if any, between the amount directly appropriated for such purpose and $40,000,000, out of funds appropriated by section 612c of Title 7. Any funds expended from such section 612c to carry out the provisions of subsection (a) of this section shall be reimbursed out of any supplemental appropriation hereafter enacted for the purpose of carrying out the provisions of such subsection, and such reimbursements shall be deposited into the fund established pursuant to such section 612c, to be available for the purpose of such section.

Limitation of administrative costs

(c) Whenever any program is carried out by the Secretary under authority of this section through any State or local or nonprofit agency, he is authorized to pay administrative costs not to exceed 10 per centum of the Federal funds provided under the authority of this section.

Determination of eligibility

(d) The eligibility of persons to participate in the program provided for under subsection (a) of this section shall

determined by competent professional authority. Participants shall be residents of areas served by clinics or other health facilities determined to have significant numbers of infants and pregnant and lactating women at nutritional risk.

Medical records; reports to Congress

(e) State or local agencies or groups carrying out any program under this section shall maintain adequate medical records on the participants assisted to enable the Secretary to determine and evaluate the benefits of the nutritional assistance provided under this section. The Secretary and Comptroller General of the United States shall submit preliminary evaluation reports to the Congress not later than October 1, 1974; and not later than March 30, 1975, submit reports containing an evaluation of the program provided under this section and making recommendations with regard to its continuation.

Definitions

(f) As used in this section--

(a) "Pregnant and lactating women" when used in connection with the term at "nutrition risk" includes mothers from low-income populations who demonstrate one or more of the following characteristics: known inadequate nutritional patterns, unacceptably high incidence of anemia, high prematurity rates, or inadequate patterns of growth (underweight, obesity, or stunting). Such term (when used in connection with the term "at nutritional risk") also includes low-income individuals who have a history of high-risk pregnancy as evidenced by abortion, premature birth, or severe anemia.

(2) "Infants" when used in connection with the term "at nutritional risk" means children under four years of age who are in low-income populations which have shown a deficient pattern of growth, by minimally acceptable standards, as reflected by an excess number of children in the lower percentiles of height and weight. Such term, when used in connection with "at nutritional risk", may

also include (at the discretion of the Secretary) children under four years of age who (A) are in the parameter of nutritional anemia, or (B) are from low-income populations where nutritional studies have shown inadequate infants diets.

(3) "Supplemental foods" shall mean those foods containing nutrients known to be lacking in the diets of populations at nutritional risks and, in particular, those foods and food products containing high-quality protein, iron calcium, vitamin A, and vitamin C. Such term may also include (at the discretion of the Secretary) any food product commercially formulated preparation specifically designed for infants.

(4) "Competent professional authority" includes physicians, nutritionists, registered nurses, dieticians, or State or local medically trained health officials, or persons designated by physicians or State or local medically trained health officials as being competent professionally to evaluate nutritional risk.

Pub.L. 89–642, § 17, as added Pub.L. 92–433, § 9, Sept. 26, 1972, 86 Stat. 729, and amended Pub.L. 93–150, § 6, Nov. 7, 1973, 87 Stat. 563.

1973 Amendment. Subsec. (a), Pub.L. 93-150. § 6(a), provided for cash grants during fiscal year ending June 30, 1975, substituted in first sentence in two instances "State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare" for "State" and substituted in second sentence provision for operation of the program for a "three-year" rather than a "two-year" period.

Subsec. (b). Pub.L. 93-150. § 6(b). authorized appropriation of $10,000,000 for fiscal year ending June 30, 1975, and provided that in the event such sum was not appropriated by August 1, 1974, the Secretary was to use $10,000,000, or, if any amount had been appropriated, the difference, if any, between the amount directly appropriated and $10,000,000, out of funds appropriated by section 612c of Title 7.

Subsec. (c). Pub.L. 93 150. § 6(c). extended dates for submission of preliminary and final evaluation reports from October 1, 1973, to October 1, 1974, and from March 30, 1974 to March 30, 1975, respectively.

Legislative History. For legislative history and purpose of Pub.L. 92-433. see 1972 U.S. Code Cong. and Adm. News. p. 3380. See, also, Pub.L. 93-150, 1973 U.S. Code Cong. and Adm. News, p.———.

APPENDIX "B"

Public Law 93-326
93rd Congress, H.R. 14354
June 30, 1974

AN ACT 88 STAT. 286

To amend the National School Lunch Act, to authorize the use of certain funds to purchase agricultural commodities for distribution to schools, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National School Lunch and Child Nutrition Act Amendments of 1974". National School Lunch and Child Nutrition Act Amendments of 1974.

Commodity Distribution Program

Sec. 2. The National School Lunch Act (42 U.S.C. 1751 et seq.) is amended by redesignating section 14 as section 15 and by inserting immediately after section 13A the following new section: 42 USC 1751 note. 87 Stat. 560. 42 USC 1763. 42 USC 1762.

"Commodity Distribution Program

"Sec. 14. Notwithstanding any other provision of law, the Secretary, during the period beginning July 1, 1974, and ending June 30, 1975, shall— 42 USC 1762a.

"(1) use funds available to carry out the provisions of section 32 of the Act of August 24, 1935 (7 U.S.C. 612c) which are not expended or needed to carry out such provisions, to purchase (without regard to the provisions of existing law governing the expenditure of public funds) agricultural commodities and their products of the types customarily purchased under such section, for donation to maintain the annually programmed level of assistance 49 Stat. 774.

for programs carried on under this Act, the Child Nutrition Act of 1966, and title VII of the Older Americans Act of 1965; and

80 Stat. 885.
42 USC 1771 note.

"(2) if stocks of the Commodity Credit Corporation are not available, use the funds of such Corporation to purchase agricultural commodities and their products of the types customarily available under section 416 of the Agricultural Act of 1949 (7U.S.C. 1431), for such donation.".

86 Stat. 88;
87 Stat. 56.
42 USC 3045.
68 Stat. 458;
86 Stat. 1492.

Level of Commodity Assistance

Sec. 3. Section 6 of the National School Lunch Act is amended by adding at the end thereof the following new subsection:

60 Stat. 231;
87 Stat. 562.
42 USC 1755.

"(e) For the fiscal year ending June 30, 1975, and subsequent fiscal years, the national average value of donated foods, or cash payments in lieu thereof, shall not be less than 10 cents per lunch, and that amount shall be adjusted on an annual basis each fiscal year after June 30, 1975, to reflect changes in the series for food away from home of the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor. Such adjustment shall be computed to the nearest one-fourth cent. Among those commodities delivered under this section, the Secretary shall give special emphasis to high protein foods, meat, and meat alternates.".

High protein foods, emphasis.

Income Guidelines for Reduced Price Lunches

Sec. 4. The last sentence of section 9(b) of the National School Lunch Act is amended by striking out "for the fiscal year ending June 30, 1974" and inserting in lieu thereof, "beginning with the fiscal year ending June 30, 1974".

86 Stat. 726;
87 Stat. 564.
42 USC 1758.

Appropriation Authorization for Nonfood Assistance

Sec. 5. The Child Nutrition Act of 1966 (42 U.S.C. 1771-1786) is amended by striking out "$20,000,000" in the first sentence of section 5(a) and inserting in lieu thereof "$40,000,000". 84 Stat. 208; 86 Stat. 727. 42 USC 1774.

Special Supplemental Food Program

Sec. 6 The third sentence of section 17(b) of the Child Nutrition Act of 1966 is amended by striking out "$40,000,000" each place it appears and inserting in lieu thereof "$100,000,000". 86 Stat. 729; 87 Stat. 563. 42 USC 1786.

Technical Amendment

Sec. 7. The first sentence of section 3 of the National School Lunch Act is amended by striking out "sections 11 and 13" and inserting in lieu thereof "section 13". 76 Stat. 944; 82 Stat. 117. 42 USC 1752.

Approved June 30, 1974.

CERTIFICATE OF SERVICE

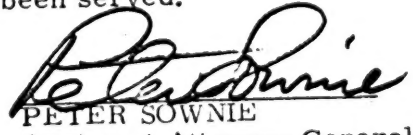
I, PETER SOWNIE, Assistant Attorney General, for the State of Arizona, hereby certify that on this 15th day of November, 1974, three (3) copies each of the Brief of the State of Arizona, Amicus Curiae in Support of Petition were air-mailed, postage prepaid to:

Lorna Lawhead Williams
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Counsel for Petitioner

and

Mr. Robert Barteis
College of Law
University of Iowa
Iowa City, Iowa 52242
Counsel for Respondents

I further certify that all parties required to be served have been served.



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In The

Supreme Court of the United States

October Term, 1974

No. 73-1703

KEVIN J. BURNS, INDIVIDUALLY AND IN HIS CAPACITY AS COMMISSIONER OF THE STATE OF IOWA DEPARTMENT OF SOCIAL SERVICES; AND MICHAEL RYAN, INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF THE SCOTT COUNTY DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

v.

LINDA ALCALA, JANE DOE AND JOAN ROE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents.

BRIEF FOR WILLIAM L. LUKHARD, DIRECTOR OF THE DEPARTMENT OF WELFARE, COMMONWEALTH OF VIRGINIA

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In The

Supreme Court of the United States

October Term, 1974

No. 73-1708

KEVIN J. BURNS, INDIVIDUALLY AND IN HIS CAPACITY AS COMMISSIONER OF THE STATE OF IOWA DEPARTMENT OF SOCIAL SERVICES; AND MICHAEL RYAN, INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF THE SCOTT COUNTY DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

v.

LINDA ALCALA, JANE DOE AND JOAN ROE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents,

BRIEF FOR WILLIAM L. LUKHARD, DIRECTOR OF THE DEPARTMENT OF WELFARE, COMMONWEALTH OF VIRGINIA

This brief as *amicus curiae,* in support of the position of petitioners, is filed by William L. Lukhard, Director of the Department of Welfare of the Commonwealth of Virginia, by his counsel, the Attorney General of Virginia, pursuant to Rule 42(4) of the Rules of this Court.

Interest Of The Amicus Curiae

Lukhard is petitioner in *William L. Lukhard* v. *Jane Doe,* Supreme Court of the United States, No. 73-1763, presently pending before this Court on his petition for a writ of cer-

tiorari. The issues raised in No. 73-1763 are the same as those presented in the instant case.

QUESTION PRESENTED

Whether the Social Security Act, 42 U.S.C. § 601, *et seq.*, mandates payment for unborn children pursuant to the Aid to Families with Dependent Children program, where such payments have been interpreted for over twenty-five years to be optional by the Department of Health, Education and Welfare, the agency charged with the responsibility for administering the Act, and where Congress has acquiesced in such interpretations?

STATEMENT OF THE CASE

This is an appeal from an order: (1) enjoining the petitioners from refusing to grant payments pursuant to the Aid to Families with Dependent Children (AFDC) program to respondents who are eligible but for the fact that they have not given birth, and (2) declaring that Iowa's policy of excluding payment for unborn children was violative of the Social Security Act, 42 U.S.C. § 601, *et seq.*

Pursuant to the AFDC program, the Social Security Act provides, *inter alia*, for payments to "a dependent child who has been deprived of parental support or care by reason . . . (of) continued absence from the home . . . of a parent."[1] Iowa and Virginia have elected to participate in this program. Since 1941, the Department of Health, Education and Welfare (HEW) has permitted payments for unborn children.[2] Since at least 1946, HEW has construed such pay-

[1] 42 U.S.C. § 606(a).

[2] 45 C.F.R. § 233.90.

ments to be optional. Iowa and Virginia are two of 35 jurisdictions which have elected not to make such payments. The definition of "dependent child" found in 42 U.S.C. § 606(a), is silent as to inclusion of unborn children.

SUMMARY OF ARGUMENT

Congress authorizes payments to "dependent children" under the AFDC program pursuant to 42 U.S.C. § 601, *et seq.* A rather detailed and lengthy definition of the term is found in 42 U.S.C. § 606(a). It is well settled that a state may not vary a federal definition of eligibility. *Carleson* v. *Remillard*, 406 U.S. 598 (1972); *Townsend* v. *Swank*, 404 U.S. 282 (1971); *King* v. *Smith*, 392 U.S. 309 (1968).

In construing statutes courts must give plain meaning to words. As a matter of semantics, one should not conclude that a "child" means something else, *i.e.*, an "unborn child." Further, this Court's holding in *Roe* v. *Wade*, 410 U.S. 113 (1973), would suggest that an unborn child should not be construed to be a child as a matter of general legislative interpretation.

The court below relied principally on administrative interpretation, rather than Congressional intent. However, in 1972, a bill was introduced in Congress which, if passed, would have prohibited payments for unborn children. While the bill did not pass, the language of the bill manifests Congress', knowledge of the optional program. In light of the action taken in 1972, and Congress' acquiescence in HEW's interpretation of the program for unborn children as optional for over twenty-five years, it should be deemed to have endorsed the HEW interpretation.

The AFDC program has been described by the Supreme Court as a "scheme of cooperative federalism," and the

states have great flexibility in defining "need" for purposes of welfare programs. Any analysis of HEW regulations should be done with these principals in mind.

45 C.F.R. § 233.90, the pertinent administrative regulation, provides in relevant part for federal participation in two categories. The first consists of definitions of terms used in 42 U.S.C. § 606(a). The second, which includes "unborn child," consists of several rather limited time-related situations. An examination of the "unborn child" category in the context in which it is found in the regulation, reveals that it is not intended to be a part of the definition of "dependent child." The court below committed error in adhering to administrative interpretation with respect to HEW's authorizing payments for unborn children and ignoring it with reference to HEW's position that such program is optional.

The result urged here is not at odds with the recent trilogy of Supreme Court cases which require adherence to federal standards of eligibility. In each of those cases the state's interpretation was found to be in contravention of the explicit language in 42 U.S.C. § 606(a). Neither the Act nor the regulations require payment for unborn children pursuant to the AFDC program.

ARGUMENT

1. Congressional Intent

Congress has authorized under the AFDC Program payments to "dependent children." 42 U.S.C. § 601, *et seq.* The term "dependent child" is defined as:

> ". . . a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, step-

> father, stepmother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment; . . . ." 42 U.S.C. § 606 (a).

It is clear that a state may not vary the federal definition of eligibility. *Carleson* v. *Remillard,* 406 U.S. 598 (1972); *Townsend* v. *Swank,* 404 U.S. 282 (1971); *King* v. *Smith,* 392 U.S. 309 (1968). The simple question is, therefore, whether Congress intended to include an unborn child within the definition of "dependent child."

In construing statutes, a court must of course give plain meaning to words. *Caminetti* v. *United States,* 242 U.S. 470, 485-86 (1917). It is submitted that despite the fact that a dictionary definition of a word may be found which is broad enough to include almost anything, the plain, common everyday use of the word "child" simply does not connote an unborn child, nor should Congress be deemed to have intended such a bizarre interpretation, unless it specifically so provides. The definition of "dependent child" in 42 U.S.C. § 606(a) is quite long and detailed; and yet, it says nothing about an unborn child. Further, no such strained interpretation is indicated in reading the purpose of the Act, which is to encourage the "care of dependent children in their own homes . . ." 42 U.S.C. § 601. As a federal district court said in *Parks* v. *Harden,* 354 F.Supp. 620, 623 (N.D. Ga. 1973):

> "As a matter of semantics, there simply is no way to conclude that the word 'child' includes something else which is not a 'child' namely, an unborn child."

Additionally, although this Court's holding in *Roe* v. *Wade,* 410 U.S. 113 (1973), that an unborn is not a "person" within the meaning of the Fourteenth Amendment to the United States Constitution, does not operate to prohibit unborn persons from receiving welfare benefits, it does appear to be instructive in an analysis of whether "dependent child" should be construed to include an unborn child as a matter of legislative construction, absent explicit language to that effect.

The vast majority of courts which have considered the issue of whether payment for unborn children is mandated by the Social Security Act have found an analysis of Congressional history contemporaneous with passage of the Act to be decidedly unfruitful.[3] This has been true of cases where Congress was found to have intended to provide for payment for unborn children[4] and where Congress was found not to have so intended.[5]

As previously stated, the policy of permitting payments to unborn children was instituted in 1941, and has apparently been considered optional since at least 1946. Congress has, with full knowledge of HEW's interpretation, amended the Social Security Act on numerous occasions since that time and has yet to change the statute so as to mandate inclusion of an unborn child within the definition of dependent child.

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[3] Some courts have cited references to high maternal death rates in the Senate and House Committee Reports presented to the Congress prior to the passage of the Social Security Act as manifesting Congressional intent that an unborn child be included in the definition of "dependent child." These parts of the reports, however, related to Title V of the Act, not Title IV, which is the subject of this litigation. Title V, of course, relates specifically to maternal care. See H.R. Rep. No. 615, 74th Cong., 1st Sess. 12 (1935) and S. Rep. No. 628, 74th Cong., 1st Sess. 20 (1935).

[4] See, *e.g.*, opinion of the Court of Appeals in the instant case.

[5] See, *e.g., Parks* v. *Harden, supra,* at 623.

In fact, in 1972, the Congress had before it a proposal which would have eliminated payment for unborn children on even an optional basis. The House Ways and Means Committee in H.R. 1, Rep. No. 92-231, stated, at p. 184:

> "Your Committee wants to make clear that an unborn child would not be included in a definition of a child. This will preclude the practice now used in the AFDC Program in some States, of finding that an unborn child does meet the definition, thereby establishing a 'family' even before the child is born."

A similar bill was introduced in the Senate. Such provision was not adopted. No action was taken because Congress determined to deal only with the adult categories of public assistance. It is submitted, however, that the very language of the bill manifests that Congress was aware of HEW's policy of permitting payments for unborn children, if indeed twenty-five years of acquiesence, standing alone, does not. One must conclude that Congress has no intention, at least at the present time, of changing the HEW policy, and, accordingly, has manifested its intent through its policy of inaction.

In fact we have a situation similar to that before the United States Supreme Court in *Flood* v. *Kuhn,* 407 U.S. 258 (1972). In that case the question of the applicability of the antitrust laws to professional baseball was raised once again. While recognizing the anomaly of one sport's being exempt from antitrust laws while others were not, the Court said:

> ". . . We continue to be loathe, fifty years after *Federal Baseball* and almost two decades after *Toolson,* to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implica-

> tion, has clearly evinced a desire not to disapprove them legislatively.
>
> * * *
>
> And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, not judicial action." 407 U.S. 258, 283-285.

While the prior "decisions" in this case are HEW policy, rather than court decisions, Congress has, nevertheless, acquiesced in HEW's option policy with respect to unborn children for over twenty-five years. The remedy, it is submitted, is congressional, not judicial.

2. Administrative Interpretation

The AFDC Program has been described by this Court as a "scheme of cooperative federalism." *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973). See also *King* v. *Smith, supra; Dandridge* v. *Williams*, 397 U.S. 471 (1970). It is well settled that a State has great flexibility in defining "need" for purposes of welfare programs. *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Dandridge* v. *Williams, supra*. It is against this background that an analysis of HEW's administrative interpretation of the AFDC program should be undertaken.

The Court below devoted little discussion to Congressional intent. It found instead that since unborn children are "eligible" for payment, then payment is mandated, relying upon *King* v. *Smith, supra; Townsend* v. *Swank, supra;* and *Carleson* v. *Remillard, supra*. While the above trilogy does stand for the proposition that a federal standard of eligibility may not be altered by a state, it is submitted that such legal

principle does not provide a resolution of the issue in the instant case.

An analysis of the pertinent HEW regulations is instructive. 45 C.F.R. § 233.90(c) is headed "Federal financial participation." Section 233.90(c)(1) begins:

> "Federal financial participation under title IV-A of the Social Security Act in payments with respect to a 'dependent child' as defined in 406(a) of the Act, is available within the following interpretations: . . ."

Definitions of certain words and phrases used in 42 U.S.C. § 606(a), which provides for payments to dependent children under certain circumstances, follow.

The specific interpretation in question in the instant case is found in 45 C.F.R. § 233.90(c)(2)(ii), which reads in pertinent part as follows:

> "Federal financial participation is available in:
>
> * * *
>
> "Payment with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;"

It is significant that § (c)2 has no language with respect to interpretations or payments to dependent children, as is found in § c(1). An examination of the other provisions found in § c(2) is also informative. In addition to payments being available for unborn children, payments are also available under that section for: (a) a child who goes to live with a qualified relative within thirty days of the first payment [§ c(2)(i)]; (b) the entire month during which a child

leaves the home of a qualified relative [§ c(2) (iii)]; and (c) persons acting for qualified relatives in an emergency [§ c(2) (iv)]. These situations are those which clearly do not fall within literal definitions of 42 U.S.C. § 606(a), but they manifest an attempt on the part of HEW to deal with certain limited and time-related problems. Even if it could be argued that the definitions in § c(1) are mandatory, such treatment would be inappropriate with respect to these rather narrowly drawn areas of financial participation. Further, if "dependent child" were intended to be inclusive of an unborn child, why not place that language in § c(1) with the rest of the definitions?

The court below relied upon HEW's policy of authorizing payment for unborn childrren while ignoring its policy of deeming such payments optional. It is respectfully submitted that such approach is incorrect. What is at issue is, of course, Congress' intent. Normally, some weight is given to administrative interpretation, because it is deemed to be an interpretation of Congressional intent. Had HEW defined dependent child to include unborn child, this would have been entitled to some weight. Had HEW defined dependent child to include unborn child and, then, said that payments were optional, it would be clearly wrong under *King, Townsend* and *Carleson*. But they did not do this! They authorized payments for unborn children and in other certain limited situations, in no way related to a definition of child, and said that such payments are optional. If such payments are not authorized by Congress, then, of course, HEW's administrative interpretation should be disregarded. If such payments are required, then, of course, it matters not what HEW's interpretation is. But to rely on HEW's interpreta-

tion on the one hand and ignore it on the other is to grossly misuse that principle of statutory construction.

The result urged here is not at odds with the teachings of *King, Townsend* and *Carleson*. In *King* v. *Smith, supra,* this Court simply said that the State of Alabama's interpretation of "parent" as used in 42 U.S.C. 606(a), to include an able-bodied man cohabiting with the mother, violated the Act. Alabama's plans, containing such a provision, had been submitted to HEW, but had never been approved. In *Townsend* v. *Swank, supra,* this Court found that Illinois' definition of dependent child was in conflict with the explicit language of 42 U.S.C. § 606(a). Finally, in *Carleson* v. *Remillard, supra,* "continued absence" was found to include absence due to military status. All of these cases found that the definitions as set out in 42 U.S.C. § 606(a) were not followed, and none relied on administrative interpretation.

As this Court said in *New York State Dep't. of Social Services* v. *Dublino, supra:*

> "In those cases *(King, Townsend* and *Carleson)* it was clear that state law excluded people from AFDC payments whom the Social Security Act *expressly* provided would be eligible." 413 U.S. 405, 421 (1973). (Emphasis supplied).

For the reasons stated in part (1) of the argument, the Act does not expressly, or otherwise, provide for payments for unborn chidren. Neither do the regulations mandate them.

CONCLUSION

For over twenty-five years HEW has permitted states to compensate unborn children at the option of the state. Thirty-five jurisdictions have elected not to make such payments. Congress with full knowledge of HEW's policy has

so far refrained from changing it. For the reasons stated herein, this Court is requested to reverse the decisions of the Court of Appeals below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stuart H. Dunn, a member of the Bar of the Supreme Court of the United and counsel for the amicus, hereby certify that I have served three copies of the foregoing Brief by depositing same in the United States Post Office, first class postage prepaid, this 18th day of November, 1974, to Lorna Lawhead Williams, Special Assistant Attorney General, State Capitol, Des Moines, Iowa 50319, counsel for petitioners and Robert M. Bartels, College of Law, University of Iowa, Iowa City, Iowa 52242, counsel for respondents. All parties required to be served have been served.

STUART H. DUNN

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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,
Petitioners,

vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,
Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF FLORIDA

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In The
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KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and
MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,
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vs.

LINDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,
Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF FLORIDA

INTEREST OF THE AMICUS CURIAE

The *Amicus Curiae* is the sovereign State of Florida. The interest of the State of Florida is twofold:

1. The substantial specific interest that the State of Florida has in two cases currently pending on the same issue;

   a. *Mixon* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), *appeal docketed*, No. 74-2119, 5th Cir., April 30, 1974, *cert. in advance of judgment in 5th Cir. denied*, 43 U.S.L.W. 3213, U.S. S.Ct. No. 74-90 (Oct. 15, 1974), *petition for rehearing filed*, U.S. S. Ct. No. 74-90 (Nov. 6, 1974).

b. *Poole* v. *Endsley*, 371 F.Supp. 1379 (N.D. Fla. 1974), *appeal docketed*, No. 74-1997, 5th Cir., April 17, 1974, *cert. in advance of judgment in 5th Cir. denied*, 43 U.S.L.W. 3213, U.S. S. Ct. No. 74-90 (Oct. 15, 1974), *petition for rehearing filed*, U.S. S. Ct. No. 74-90 (Nov. 6, 1974).

The State of Florida was the *successful* litigant in both *Mixon* and *Poole*. *Mixon* was tried in the United States District Court for the Middle District of Florida and *Poole* was argued in the United States District Court for the Northern District of Florida.

2. The important general interest which any sovereign state has in the construction and application of an Act of Congress and its implementing Federal regulations which involve thousands of the state's citizens personally, as well as millions of dollars of the state's available resources, and the state's administrative system.

SUMMARY OF ARGUMENT

The issue presented for review by this Court is:

Does Title IV of the Social Security Act of 1935, as amended, [42 U.S.C. §601, *et seq.* (1970)] require, or even allow, fetal participation in the Aid to Families with Dependent Children program?

The State of Florida submits:

(1) That Title IV of the Social Security Act does *not* permit the award of Aid to Families with Dependent Children benefits to fetuses and cannot be so construed,

and

(2) That the United States Department of Health, Education and Welfare's implementing regulations, which proffer optional State participation in fetal coverage, are *illegal* since they are outside the scope of HEW's authority.

As a legal alternative, if this Court should rule that fetal coverage is somehow permissible within the perimeters of Title IV of the Social Security Act, then Florida submits that it is included only as an option.

The Social Security Act may be denominated hereafter as the Act and the Aid to Dependent Children Program as AFDC. The United States Department of Health, Education and Welfare may be referred to hereafter as HEW.

ARGUMENT

INTRODUCTION

The legal issues brought to the Bar by this case are easily set out and defined. The complexities that swirl about the issues involve definitions, legislative history, and interpretation of United States Supreme Court decisions and an Act of Congress. The State of Florida submits that the complexities may be untangled by a straight logical look, unclouded by protean emotion, at the Social Security Act and relevant court decisions.

Both sides to this controversy agree that the Social Security Act defines those eligible for the receipt of Aid to Dependent Children benefits. The disagreement arises as to what the relevant provisions of the Social Security Act actually mean.

Florida contends that the English language should be used, and was used by those who drafted the Act, in a simple, straightforward way. If verbal or mental contortions are necessary to force the Act to conform with the view of "what ought to be" then "what ought to be" is not what actually is. The Legislative branch of the government concerns itself with what "ought to be"; the Judicial, with what "is." Proponents of fetal coverage confuse the two.

Legal Aid Associations throughout the country are united through federally financed research centers that support them with theories and research for "legal reform." Under these circumstances, when the non-existent ball of "specific exclusion" is put into play it is run simultaneously in many states throughout this nation creating the illusion of a valid legal theory. In addition, the players in this charade refuse to drop the ball even when this Court has clarified *to the contrary* this so-called "theory."

The position of the State of Florida may be set forth briefly as follows:

1. Title IV of the Social Security Act does not include, or even allow, fetal coverage in the AFDC program. This position is buttressed by the plain language of the Act, the legislative history, and the court decisions. It follows that implementing HEW regulations are therefore illegal, the Act itself making no provision for fetal coverage.

2. As a legal alternative, *if* this Court should rule that fetal coverage is somehow permissible within the perimeters of Title IV of the Social Security Act, then Florida submits that it is included only as an option. In this instance the federal agency charged with the implementation of the Act would

be looked to and said agency interprets the Act as providing only an option.

This position of the State of Florida, which gives two alternative positions of the State, depending upon the view this Court takes on the first question of fetal coverage, is not contradictory in the legal sense. However, the position usually advanced by the proponents of fetal coverage *is* contradictory; in the usual, and in the legal, sense. Respondents contradictorily say, that HEW's interpretation must be looked to when consistent with their theory but must be ignored when not consistent with their theory.

Florida will discuss the two positions advanced separately, looking at the Social Security Act, HEW Regulations and court decisions in regard to both.

I. FETAL COVERAGE NOT ALLOWABLE

The State of Florida believes the correct position to be that the Social Security Act does not require, or even allow, fetal coverage, under Title IV.

A. *SOCIAL SECURITY ACT*

1. *Plain Language of Act*

The Social Security Act does not include coverage for fetuses under Title IV.

Title IV of the Social Security Act, Section 401 (Codified in 42 U.S.C. §601) establishes a cooperative federal-state welfare program designed:

> "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each state to furnish financial assist-

> ance and rehabilitation and other services, as far as practicable under the conditions in such state, to needy, dependent children . . ."

In order to assist the poor, states may elect to participate in Title IV of the Social Security Act. If a state elects to participate, Aid to Dependent Children is furnished as defined in 42 U.S.C. §606 (a):

> "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is *living* with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more such relatives as his or their own home, and (2) who is (a) under the age of eighteen, or (b) under the age of twenty-one and (as determined by the state in accordance with standards prescribed by the secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment." (Emphasis supplied.)

The plain language of the Social Security Act itself appears to exclude fetal coverage.

In the literal sense, it is impossible to encourage the care of a fetus in the home of a relative other than the mother-to-be. In the technical sense, it is actually impossible for a woman to be a mother prior to the birth of a live child. Under ques-

tioning by the Court in the *Mixon*[1] case Plaintiff's own medical expert testified that prior to the live birth of a child the common terminology for a woman was "mother-to-be"; and that medically speaking she was not a mother until the birth of a live child.

Other portions of Title IV of the Social Security Act make sense only if the term "child" is limited to born children. For instance:

1. 42 U.S.C. §602 (a) (7) and (8) require consideration of the child's income and resources in establishing the amount of assistance. Obviously it is impossible for a fetus to have income or resources.

2. U.S.C. §602 (a) (11) requires notice to law enforcement officials when the state furnishes AFDC to a "child who has been deserted or abandoned by a parent."

3. 42 U.S.C. §602 (a) (17) requires the state to attempt to establish the paternity of a child *born* out-of-wedlock.

4. 42 U.S.C. §602 (a) (16) requires notice to court or law enforcement agencies of unsuitable home conditions due to neglect, abuse or exploitation of children receiving AFDC payments.

The citations above clearly indicate that Congress intended to include only born children in the class of dependent children referred to in 42 U.S.C. §606 (a). Numerous other sections of the Act make sense only if the term "child" means what it normally means, to wit: a born child.

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1 *Mixon* v. *Keller*, 372 F.Supp. 51 (M.D. Fla. 1974), *appeal docketed*, No. 74-2119, 5th Cir., April 30, 1974, *cert. in advance of judgment in 5th Cir. denied*, 43 U.S.L.W. 3213, U.S. S. Ct. No. 74-90 (Oct. 15, 1974), *petition for rehearing filed*, U.S. S. Ct. No. 74-90 (Nov. 6, 1974).

2. *The Word "Child"*

The law has always jealously guarded the legal meaning of any highly charged and important word within its structure. For decades case law has defined and redefined such important considerations as "child" and "fetus" and viable." These words form part of the superstructure of almost all aspects of the discipline of the law coming into play in such diverse sectors as probate, criminal law, negligence and contracts.

Medicine also has developed precise terms to define its particular needs. The Plaintiff *Mixon's*[2] own expert, Doctor R. Donald Garrison, a noted neonatologist, testified that a fetus is never medically or clinically referred to as a child, unborn or otherwise and that a fetus becomes a child at the instant of birth.

In many instances the medical and legal terms overlap. The Latin phrase *"in utero"* is such an example.

As pointed out by the District Court in the *Mixon* case at 54 it is inconceivable that the Congress of the United States is composed of men so "naive, unversed or shortsighted in medical terminology as to ignore or omit the term 'fetus' where it is alleged they specifically intended to include the same." Nor would the legal, as well as the medical, ramifications of the words "fetus" and "child" be lost upon members of Congress – many of them being attorneys.

Florida stands unconvinced by urgings that the dictionary definition of "child" includes "fetus." At first glance this argument might appear to have some meaning. Momentary

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2 *Mixon* v. *Keller, supra.*

reflection by any average man, however, calls forth the knowledge that extensive dictionary definitions frequently include alternative meanings having little or no relation to common usage, much less the technically correct medical or legal usage.

In the light of the technical aspects of the Social Security Act and the sophistication of the men who drafted it, Florida submits that the legal and medical meanings of the term "child" are the most relevant.

However, if this Court wishes to examine the ordinary usage of the word Florida submits that such examination will favor Florida's position. In normal conversational usage, "child" does not mean "fetus." This Court is being urged to say that "child" and "fetus" are interchangeable which is simply not the case. A woman is not considered to *have* a child when she is carrying a fetus – she is *expecting* a child. Until the birth of a live child, a woman is a pregnant female – not a mother. If the fetus is stillborn or aborted she does not have a child and does not become a mother. Only upon giving birth to a live child does a woman become a "mother" or "parent."

3. *Legislative History of Act*

Title IV of the Social Security Act grew out of the state-financed "mothers' pensions" programs which existed prior to the enactment of the Social Security Act in order to make it possible for widows to keep their children at home rather than send them to an almshouse or orphanage. So the absence of explicit references to unborn children in the Congressional debates relating to the original Title IV of the Social Security Act means that Congress never intended or considered the un-

born to be within the class of children which Title IV was intended to aid. Congressional concerns regarding prenatal care and infant mortality rates were manifested in other Titles of the Social Security Act.

House and Senate reports at the time the Social Security Act was passed discussed briefly the purposes of the several titles in the Social Security Act. The remarks about Title IV (AFDC) emphasized the plight of children during the Depression without mentioning pregnant women and fetuses. H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935); S. Rep. No. 628, 74th Cong., 1st Sess. (1935). At the same time Congress expressed a concern with the high maternal death rate and infant mortality rate existing in the 1930's in this country. This concern found expression through grants to the states for reducing infant mortality through Title V of the Social Security Act. 42 U.S.C. §701, *et seq.* However, it is *not* Title V, but Title IV under which the AFDC program is funded. It is Title IV which is the subject of this suit.

"Proof of legislative intent" to include the fetus is usually provided by quoting from material concerning Title V of the Social Security Act, *Maternal and Child Health and Crippled Children's Services.* This chapter is to provide "services for reducing infant mortality and otherwise promoting the health of mothers and children, . . ." 42 U.S.C. §701 (1). It is certainly possible here to dredge up many quotes which pertain to the fetus. However, as this Court is aware, Title V is separate and distinct from Title IV. It is inappropriate and misleading to quote legislative history pertaining to a title of the Social Security Act not even under consideration by this Court.

The following quote is from Mr. Ellenbogen in a statement to Congress which he made on May 20, 1935, at the time of the passage of the Social Security Act:

> "In our modern society, Social Security in its true sense means the enactment of laws that will safeguard the fundamentals of life to every human being *from the time of birth* until the time of death.
>
> * * *
>
> The child welfare laws and public health measures which we passed should *protect the child from the day of his birth* until he reaches maturity.
>
> * * *
>
> I visualize for the future Social Security laws which will accompany the individual from his cradle to his grave; Social Security laws which will step in and *watch over the child when it is born;* which will assure an education to every child according to his ability." 79 *Cong. Rec.* 7838, 7839 (Emphasis supplied.)

This clearly sets out Congressional intent.

The statement that Congress would have acted inconsistently if the Social Security Act includes unborns under Title V but not under Title IV shows a basic misunderstanding of the Act. Each Title stands alone. Each Title is implemented by separate regulations. A superficial perusal of the different Title names will show that all Titles are not interrelated. For instance, Title VI is *Grants to States for Services to the Aged, Blind, or Disabled.* 42 U.S.C. §801, *et seq.*

There is much talk of "consistent with the purposes of the Act." There is much pontification as to the benefits of prenatal care. The *legality,* not the desirability, of AFDC fetal coverage is what *should* be under discussion. As a practical matter thorough knowledge of the benefits available under Title IV might be helpful. Without any action by this Court,

a woman who gives birth to a live child will receive a three-month Medicaid backdate coverage for all bills (including doctor, hospital and drug) in connection with the birth, if timely application is made after the birth of said child who is found to be eligible for an AFDC money grant. 45 C.F.R. §206.10. It is not the purpose of the Courts to decide what is "consistent with the purposes of the Act." Many desirable ideas are consistent with the purposes of the Act and are not covered by the Act. This Court should decide the actual coverage provided under the Act.

B. *HEW REGULATIONS*

Florida therefore submits that the Social Security Act is clear on its face. HEW in its decision to allow options within the implementing regulations has made an administrative decision which expands the Act.

In 1972, both Houses of the 92nd Congress recognized the existing HEW practice of giving an option to the state as regards the inclusion of fetuses in the AFDC program. Both houses indicated that unborn children would not and should not be included in the proposed family assistance program in HR-1 (Codified as P.L. 92-603, 86 Stat. 1329) which would have applied on a uniform basis nationally had it been adopted.

The House Ways and Means Committee Report of H.R. 1, H.R. Rep. No. 92-231 at 184, 92nd Cong., 2nd Sess. (1972):

> "Your Committee wants to make clear that an unborn child would not be included in the definition of a child. This will preclude the practice, now used in the AFDC program in some States, of finding that an

> unborn child does meet the definition, thereby establishing a 'family' even before the child is born."

The Senate Finance Committee Report, S. Rep. No. 92-1230, at 108, 92nd Cong., 2nd Sess. (1972):

> "Regulations of the Department of Health, Education and Welfare *permit* Aid to Families with Dependent Children payments for a child who has not yet been born. The committee bill would make *unborn* children ineligible for AFDC." (Emphasis supplied.)

The Opinions in the Second Circuit and the *Mixon* case stated that the courts generally appeared unaware that the reason the legislation was not passed was because the Congress decided to deal only with adult categories of public assistance in HR-1.[3] The reports quoted above are often used by both sides to this controversy to reason to opposite conclusions. The salient point is the *reason* why the legislation was not passed. Proponents of fetal coverage attempt to confuse the issue by intimating that the Congress as a whole rejected the committee reports by failure to pass the legislation. This is simply not the case.

Instead, Congress, aware of the optional HEW plan to include fetuses, intended to force compliance with the intent and plain language of the Social Security Act. Florida submits that HEW has clearly overstepped itself and that Congress meant to correct the situation.

Adding great substance to Florida's contention that the HEW optional regulation is beyond HEW's authority is the

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3 *Wisdom* v. *Norton*, 372 F.Supp. 1190 (D. Conn. 1974) *rev'd*, No. 1058, Sept. Term 1973, 5675, 5688, (2nd Cir., filed Oct. 11, 1974); *Mixon* v. *Keller*, 372 F.Supp. 51, 55 (M.D. Fla. 1974).

way in which said "optional benefit" came into being. The Social Security Act was passed in 1935. No payments to fetuses, optional or otherwise, were ever considered or made until 1941. Federal participation was allowed in a fetal program in Wisconsin in 1941.

It is of interest how the question came to HEW. The State of Wisconsin did not formally request that fetal coverage be allowed under Title IV of the Social Security Act. Instead Wisconsin simply made payments on behalf of fetuses. Then auditors for the Social Security Board took exception to the Wisconsin program which made such payments. The Social Security Board, the predecessor of HEW, made a decision that the Board would approve federal financial participation in those states which included coverage of the unborn in their own program. At the time the State of Wisconsin was the only state making such payments.

This was an obvious attempt by the Board to avoid audit exceptions for the State of Wisconsin. This laudable concern for Wisconsin's finances grew into a policy of optional fetal coverage. At the time the first participation for fetuses occurred there was no understanding that the Board had construed the word "child" in the Social Security Act to include the term "fetus." The bureaucratic decision in regard to an audit exception involving one State grew to become a full-fledged nationwide option over a period of some years. It is important that there was never any perusal of the Act, informal or otherwise, in the policy decision that fetal coverage was an allowable option.

Fetal coverage was not added to the Handbook of Public Assistance Administration until 1946. Part 4, Section 3412.6. These provisions were similar to and are now superseded by

regulations in 45 C.F.R. §233.90 which purport to be only optional in nature.

C. *COURT DECISIONS*

There are two main bodies of case law to be dealt with. That in regard to the *Roe* v. *Wade* situation, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S. Ct. 705 (1973), and that in regard to the *King, Townsend, Carleson* test, *King* v. *Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S.Ct. 2128 (1968); *Townsend* v. *Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S.Ct. 502 (1971); *Carleson* v. *Remillard*, 406 U.S. 598, 32 L. Ed. 2d 352, 92 S.Ct. 1932 (1972).

1. *Roe v. Wade*

Respondents advance the theory, under the Fourteenth Amendment, of Equal Protection in regard to the unborn. This Court in *Roe* very clearly indicated the position of the unborn in regard to the Fourteenth Amendment. The Fourteenth Amendment is not applicable to the unborn.

Roe discusses the life of a fetus in relation to three trimesters. For approximately the first trimester the woman exercises sole right over the life of the unborn. She may at any time, for any reason, abort it. During approximately the second trimester the state has a limited right in regard to the unborn. Again the woman retains basic and compelling control. The state may only regulate, in promoting its interest in the health of the woman, the abortion procedures in ways that are reasonably related to maternal health. The woman during the first two trimesters, or until viability, exercises complete control over the existence or non-existence of the fetus she carries.

During the third trimester the state may *choose* to exercise its interest in the potentiality of human life by regulating or prescribing abortion. However, and this is the important point, if the state does not choose to regulate or prescribe abortion, the woman retains right of life or death over the fetus she carries. Therefore, if a fetus has no right to life (unless the state chooses within the last trimester to exercise some proscription of abortion) then the fetus certainly has no right to welfare. It would be illogical for any state to be required to pay welfare for a fetus that had no right to "equal protection" of the Fourteenth Amendment and whose continued existence was at the whim of the woman carrying same.

The mother is not the eligible party in the AFDC program. The child is the individual who is or is not eligible for the benefits of AFDC. The mother receives benefits under the plan only because she is the caretaker relative of the eligible individual. Threfore, the mother herself has no standing.

Since the right to AFDC comes through the child and not through the mother and since the fetus has no absolute right to existence it certainly has no right to welfare. To hold otherwise would put the state in the illogical position of possibly paying welfare and then having the mother decide to abort. The state might then be required to pay for the abortion under Medicaid!

2. *King, Townsend, Carleson*

The trilogy of cases continually cited by advocates of fetal coverage, to-wit: *King, Townsend* and *Carleson*, do not contain rulings helpful to their position. The State of Florida agrees that a State Plan for AFDC must include all individuals eligible under federal standards. In *King, Townsend* and *Carleson* the three groups seeking benefits were eligible un-

der applicable federal standards. Those who seek fetal benefits are not eligible individuals under applicable federal standards.

As stated in *Parks* v. *Harden*, 354 F. Supp. 620 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973, at 623:

> "More importantly an examination of the cases relied on reveals that the rulings were bottomed not on a variance between the State Plan and the HEW regulations, but on a variance between the state standard and the Act of Congress itself. Thus while some reliance was placed on administrative interpretation in *King*, the ultimate holding was that Alabama's "substitute parent" regulation conflicted with Congress's definition of "parent" in 42 U.S.C. §606 (a) (2) (b) in *Townsend*. Finally, in *Carleson*, California's exclusion of military personnel was held to violate the definition of "continued absence" in 42 U.S.C. §606 (a) (1). In each instance, the result came about through an ascertainable variance between the state standard and that expressed in the language of the statute as adopted by the Congress."

Florida complies with the language adopted by Congress. Seekers of fetal coverage have invented the theory of "specific exclusion" based upon their incorrect interpretation of *King*, *Townsend* and *Carleson*. Under this theory anyone not specifically *excluded* by Congress is *included*. This attempt to shift the burden of proof is inverted logic requiring Defendants to prove the item was expressly excluded instead of making Plaintiffs prove the item is included. To Florida this theory appears patently unsustainable. However, the problem of this theory being advanced simultaneously by Legal

Aid Associations across the nation results in a snowballing technique giving the theory some shimmer of reality.

The Supreme Court of the United States, however, has clarified the trilogy of cases in *New York State Department of Social Services* v. *Doblino*, 313 U.S. 405, 37 L. Ed. 2d, 668, 699, 93 S.Ct. 2507, 2517 (1973):

> "In this context, the dissenting opinion's reliance on *Townsend* v. *Swank*, *Carleson* v. *Remillard*, and *King* v. *Smith*, *supra*, is misplaced. In those cases it was clear the state law *excluded* people from AFDC benefits whom the Social Security Act *expressly provided* would be eligible. The court found no room either in the Act's language or legislative history to warrant the state's additional eligibility requirements." (Emphasis supplied, citations omitted.)

Even in the face of this Court's clear disavowal of the "specific exclusion" theory the contention is still advanced that since Title IV of the Social Security Act does not specifically exclude unborns they are thereby included in the Act. Florida rejects this mutilation of the Act and the Court decisions.

II. IF FETAL COVERAGE IS PERMISSIBLE IT IS ONLY AN OPTION.

Though Florida asserts that fetal coverage is not allowable under Title IV of the Social Security Act, *if* this Court should rule that fetal coverage is somehow permissible within the perimeters of Title IV, then Florida submits that it is included only as an option which any state may freely reject.

A. *THE SOCIAL SECURITY ACT*

Florida believes that the section on the legislative history

of the Act clearly demonstrates that Congress did not intend fetal coverage under Title IV. However, looking at the problem in the light most favorable to the fetal coverage advocates it appears that Congress may have "acquiesced" in HEW's optional coverage.

Bureaucratic implementation of an Act which falls *short* of the intended Congressional coverage is usually quickly corrected by Congress. Whereas, as a practical matter, expansion of intended coverage is usually dealt with in a more lenient and slower manner. However, it is apparent from the Committee Reports of the 92nd Congress previously quoted in this brief that Congress intended to stop the optional coverage.

Therefore Florida submits that if Congress had intended fetal coverage under Title IV, Congress would have acted to procure said coverage at some time during the period from 1935 to the present. If one wishes to say that there has been tacit congressional approval, one must look to see what the status quo actually is. HEW has administratively expanded the Social Security Act to include fetal coverage – but *only* as a State-elected *option*. So *if* there is tacit congressional approval, this is what has been approved – *optional* fetal coverage, not mandatory.

B. *HEW REGULATIONS*

Advocates of fetal coverage assert that the Social Security Act forces fetal coverage within the AFDC program. This belief would force the conclusion that the HEW regulations were incorreet in that they provided only an option. This would then mean that HEW's optional regulation interpretation as regards fetuses would not be acceptable to either side of the controversy. However, fetal advocates usually illogi-

cally assert that the Courts should look to the interpretation in 45 C.F.R. §233.90 as an "agency interpretation" of fetal coverage being included under the Social Security Act. They then assert that Courts should not look to the fact that this interpretation includes only optional fetal coverage. The optional part of the agency interpretation does not fit the fetal advocates' theory.

Fetal advocates often quote the principle that the interpretation of the agency charged with the implementation of an Act of Congress will be given substantial weight by the Court. Florida asserts that one may not pick and choose parts from the same agency interpretation. Either the agency interpretation is right or it is wrong. Florida asserts that HEW is wrong. However *if* this Court says that unborns could be included in AFDC under Title IV then Florida says that HEW is right and coverage is optional.

Fetal coverage advocates say HEW is partly right and partly wrong; they say the Court should defer to HEW practice as regards eligibility of fetuses but should not defer to agency practice as regards the optional nature of the coverage. However, Florida submits it is grossly illogical to demand adherence to agency policy when it suits one's arguments and to demand disregard of agency policy where it conflicts with one's arguments. Advocates of fetal coverage say, in effect, "Use HEW's interpretation" but "Don't use all of it."

Part 233 of Title 45 of the Code of Federal Regulations is entitled "Coverage and Conditions of Eligibility in Financial Assistance Programs." Within each subsection of this Part there are two divisions: "State Plan Requirements" and "Federal Financial Participation." The first section is mandatory requirements which must be complied with if the State assistance program is to receive Federal funding. The second sec-

tion establishes the conditions and limits on Federal funding and does not specify that States must participate in such funding or programs. The regulation under question by this suit permitting assistance to unborn children is not found in the mandatory "State Plan Requirement" Section, but in the optional "Federal Financial Participation" Section.

If fetal coverage was a mandatory requirement Florida would not have received HEW sanction of the State Plan.

> ". . . 42 U.S.C. §602 (a), (b) purports to set out the mandatory requirements for all state plans. Unborn child coverage is not a requisite therein nor in the penalties section. 42 U.S.C. §604." *Parks* v. *Harden*, 354 F.Supp.620, 625 (N.D. Ga. 1973).

An analogous option exists in 45 Code of Federal Regulations 233.10 (b) (2) (ii) (a) (1) which has been construed by the Court in *Townsend* v. *Swank, supra. Townsend* held that *if* a State *elected* an *option* that said option must be applied according to Federal requirements and that a State could not create eligibility requirements different from those Federally mandated. The Act clearly states that if an individual is "attending a school, college, or university, or regularly attending a course of vocational or technical training;", 45 C.F.R. §233.10 (b) (2) (ii) (a) (1), he may be covered. The State had, in effect, divided the option and was allowing AFDC for an individual attending vocational or technical school but not for an individual attending a college or university. This was an obvious violation of the Act in that only a part of the option was selected. The Court did not hold that because an option existed the state was therefore compelled to supply AFDC to those eligible under said option if the state had not elected the option.

Numerous other options for state assistance plans are authorized in the Federal regulations. As an example, 45 C.F.R. §248.10 (b) (3) provides an option as to medical assistance being available to "medically needy" persons. Florida has not elected this option and supplies Medicaid only to "categorically needy" (persons receiving financial assistance), not to the "medically needy" (persons of low income but not receiving welfare payments).

45 C.F.R. §206.10 (a) (6) gives the state an option as to the date the assistance payments may begin. In this case the state may elect the starting date for the beginning of financial assistance from the first of the month in which application is received to a date no later than the date of authorization of payment (but no later than 30 days after date of application).

Fetal advocates' illogical contention is that if an individual could be covered by an option in the Regulations, then said individual must be covered by it, whether or not the State has elected the option. This hypothesis has been resoundingly refuted:

> "A reading of the recent Supreme Court decisions leads to the conclusion that mere inclusion in the regulations does not in itself require the payment of benefits. That States still have latitude in their choice of programs is evident. However, if any program is once adopted, the state plan must meet minimal federal standards of coverage within the program . . . However, the regulations themselves do not require the inclusion of the unborn child as a mandatory recipient." *Parks* v. *Harden*, 354 F.Supp. 620, 623 (N.D. Ga. 1973).

C. *COURT DECISIONS*

Even if this Court should order that AFDC payments to fetuses were permissible it would be necessary to restrict the payments to a viable fetus in a state *which has chosen* to exercise its rights under *Roe* v. *Wade* to proscribe abortion in the last trimester; and has such valid statutes on its books.

CONCLUSION

Therefore, for the reasons stated, the State of Florida respectfully submits that the Judgment of the United States Court of Appeals for the Eighth Circuit should be reversed, and that this Court should find that Title IV of the Social Security Act does not permit Aid to Families with Dependent Children benefits for fetuses.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, EVA DUNKERLEY PECK, a Member of the Bar of the Supreme Court of the United States and Counsel of Record of the Sovereign State of Florida, hereby certify that I have served three copies of the foregoing BRIEF AMICUS CURIAE OF THE STATE OF FLORIDA by depositing the same in the United States Post Office, air mail postage prepaid this 15th day of November, A. D. 1974, to RICHARD C. TURNER, Attorney General of Iowa, and LORNA LAWHEAD WILLIAMS, Special Assistant Attorney General of Iowa, State Capitol, Des Moines, Iowa 50319, Attorneys for Kevin J. Burns and Michael Ryan, and ROBERT BARTELS, College of Law, University of Iowa, Iowa City, Iowa 52242, Attorney for Linda Alcala, Jane Doe, and Joan Roe. All parties required to be served have been served.

EVA DUNKERLEY PECK

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SUPREME COURT, U. S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-1768

KEVIN J. BURNS,
Appellant,

vs.

LINDA ALCALA, individually and on behalf of all other persons similarly situated,
Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS,
Appellant,

vs.

LINDA ALCALA, individually and on behalf of all other persons similarly situated,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

This motion of Pacific Legal Foundation for leave to file the annexed brief *amicus curiae* is respectfully made pursuant to Rule 42, consent to the filing of a brief having been granted by counsel for Appellant Burns but denied by counsel for Appellee Alcala.

Pacific Legal Foundation is a nonprofit tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Ten of the eighteen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation is gravely concerned by the action of the court below in overturning a state welfare policy on a rationale which ignores the controlling precedents established by this Court in *Roe v. Wade,* 410 U.S. 113 (1973); *Jefferson v. Hackney,* 406 U.S. 535 (1972); *New York State Department of Social Services v. Dublino,* 413 U.S. 405 (1973); and *Dandridge v. Williams,* 397 U.S. 471 (1970), among others.

Pacific Legal Foundation considers that this case is of special significance in that it raises fundamental questions concerning the propensity of some lower courts to mandate upon the states expanded interpretations of welfare eligibility. Pacific Legal Foundation appears here because of its conviction that the courts should not levy upon states welfare expenses not mandated by Congress.

Pacific Legal Foundation believes that the magnitude of this issue was not fully developed in the Court of Appeals and doubts that the parties will fully ad-

dress this aspect of the case in the present proceedings.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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Pacific Legal Foundation.

November 1974.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS,
Appellant,

vs.

LINDA ALCALA, individually and on behalf of all other persons similarly situated,
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On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

INTEREST OF AMICUS

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The United States Court of Appeals for the Eighth Circuit, in an opinion reported at 494 F.2d 743 (1974), affirmed an injunction requiring the State of Iowa to grant Aid to Families with Dependent Children (AFDC) to fetuses, holding that the term "dependent child" as used in §406(a) of the Social Security Act, 42 U.S.C.A. §606(a), is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act.

ARGUMENT

I

CONGRESS HAS NEVER CONSIDERED A FETUS TO BE A CHILD IN ANY OF ITS STATUTORY PROGRAMS

The issue presented by this case is whether a fetus is a "dependent child" within the meaning of §406(a) of the Social Security Act, 42 U.S.C.A. §606(a), and consequently entitled to receive Aid to Families with Dependent Children [AFDC]. As noted by the Court of Appeals, as of 1971, 18 jurisdictions provided AFDC benefits to fetuses while 34 jurisdictions did not. *Alcala v. Burns,* 494 F.2d 743, 745.

Congress has created numerous programs to provide benefits to or on behalf of children. Not one of these programs, however, provides any benefits to other than born children. This may well be because, as implicitly recognized by this Court in *Roe v. Wade,* 410 U.S. 113 (1973), the needs of the unborn cannot be considered separately from the needs of the expectant mother. Thus, in Title V of the Social Se-

curity Act—Maternal and Child Health and Crippled Children's Services—§508(a), 42 U.S.C.A. §708(a) provides for grants to state health agencies for the provision of "necessary health care to prospective mothers (including, *after childbirth*, health care to mothers and their infants). . . . " [emphasis added]. The language of this program demonstrates that Congress was aware of the distinction between children and fetuses. Aid to the infant does not commence until "after childbirth", before birth, the aid is characterized not as going to the fetus but rather to the prospective mother.

To similar effect, Congress has appropriated 40 million dollars for fiscal year 1975 to provide a special supplemental food program to pregnant or lactating women and to infants. 42 U.S.C.A. §1786. As in Title V, Congress has provided assistance not to the fetus, but to the pregnant woman and after birth of the child, to both the mother and the infant.

In establishing a program to benefit victims of black lung disease, Congress made the rate of payment dependent upon the number of children of the victim. (30 U.S.C.A. §922(a)(3).) Although Congress has not specified whether this payment rate included fetuses, it has never been contended that the program was intended to include the unborn in this consideration.

Congress has made birth a major operative factor in obtaining the benefits of citizenship. Thus, pursuant to 8 U.S.C.A. §1401(a), citizenship may be established by being born in the United States and subject

to the jurisdiction thereof, even if the subject's parents are not citizens. Under this provision, the status of being a fetus in the United States establishes no rights of citizenship. One could be carried in the womb in the United States by a Canadian mother for the full term less one day, but if the mother is visiting Canada on the date of birth, the child is not a United States citizen. Congress has accorded the status of the fetus no accrued rights; only the fact and place of birth may be considered.

In *Wyman v. James*, 400 U.S. 309, 324 (1971), this Court drew the analogy between the Social Security Act and the Internal Revenue Code in the situation of noncooperative welfare recipients and taxpayers. The analogy is similarly apt in the case of fetuses.

The Internal Revenue Code provides an "exemption of $750.00 for each dependent (as defined in section 152) . . . who is a child of the taxpayer. . . ." 26 U.S.C.A. §151. That such exemptions include only born children is demonstrated by the referenced section 152. That section provides in part that:

> "The term 'dependent' does not include any individual who is not a citizen or national of the United States unless such individual is a resident of the United States, of a country contiguous to the United States, of the Canal Zone or of the Republic of Panama. The preceding sentence shall not exclude from the definition of 'dependent' any child of the taxpayer—
>
> "(A) born to him, or legally adopted by him, in the Philippine Islands before January 1, 1956 . . . ." 26 U.S.C.A. §152(b)(3).

As noted heretofore, pursuant to 8 U.S.C.A. §1401, birth is a prerequisite to determination of citizenship. This is re-emphasized by Congress in its reference in 26 U.S.C.A. §152(b)(3)(A) to children "born . . . or legally adopted. . . . " As in the rest of its statutory programs, Congress has restricted the benefits of tax exemptions to children who have been born.

This Court noted in *Roe v. Wade*, 410 U.S. 113, 157, n. 53, that it was not aware that Congress had ever authorized counting of fetuses in the taking of the census, although the Constitution requires the enumeration of "persons" which would include children. U.S. Const., Art. I §2, cl. 3.

Title II of the Social Security Act (Old Age Survivors, and Disability Insurance Benefits) also restricts benefits to born children. Section 202(d)(8), 42 U.S.C.A. §402(d)(8), provides in part:

> "In the case of a child who was *born* in the one year period during which such child *must have been living* with and receiving at least one-half of his support from such individual, such child shall be deemed to meet such requirements for such period if, as of the close of such period, such child *has lived* with such individual in the United States and received at least one-half of his support from such individual for substantially all of the period which begins on the *date of birth* of such child." (Emphasis added.)

This provision makes clear the intent that eligibility for Title II benefits is not only restricted to living children but is directly tied to the date of birth of the child. *Amicus curiae,* Pacific Legal Foundation,

is aware of no federal statute which includes a fetus within the definition of the term child.

II

CONGRESS DID NOT INTEND THE TERM "DEPENDENT CHILD" TO INCLUDE A FETUS FOR PURPOSES OF AFDC

As noted in *Wisdom v. Norton*, ... F.2d ..... (2d Cir. Doc. No. 74-1402, October 11, 1974) the practice of the Department of Health, Education and Welfare (HEW) allowing AFDC payments on behalf of fetuses "originated as an *ad hoc* decision to defer to a state's policy, rather than as a rule based on an interpretation of the federal statute." Mem. Dec. 5687, n. 36. The State of Wisconsin had provided payments on behalf of fetuses under a state program antedating the Social Security Act. The extension of this practice to the federal program was made the subject of an audit exception. Upon consideration, the Social Security Board specifically declined to enunciate a formal policy, but directed that the Wisconsin audit exception be waived. *Parks v. Harden*, 354 F. Supp. 620, 625, n. 5 (N.D. Ga. 1973). Since §1104 (42 U.S.C.A. §1304) provides that "the right to alter, amend, or repeal any provision of this Act is reserved to Congress", such administrative expansion of the act was completely improper.

In concluding that "AFDC statutory provisions do not permit, much less authorize, payments to the unborn", *Wisdom v. Norton, supra*, Mem. Dec. 5690, the Second Circuit noted the legislative history of

Title IV. That court cited the Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong. 1st Sess. 30 (1935), which declared:

> "These are not primarily aids to mothers but defense measures for children. They are designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society." Mem. Dec. 5682-5683.

Since one cannot provide aid to the fetus without aiding the prospective mother, this statement indicates the intent of Title IV to aid only born children.

The section (406(a)) of the Social Security Act in issue states that "the term 'dependent child' means a needy child . . . who is living. . . ." 42 U.S.C.A. §606(a). As noted by this Court in *Roe v. Wade*, 410 U.S. 113, 161:

> "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth. . . ."

Since Congress has restricted the definition of the term "child" to one who is "living", eligibility for AFDC is dependent upon live birth.

In *Mixon v. Keller*, 372 F. Supp. 51, 54 (M.D. Fla. 1974), *cert. denied*, ... U.S. ....., 43 L.W. 3213, the court, in rejecting fetal eligibility for AFDC, quoted

approvingly the language of *Parks v. Hardin, supra,* at 623-624:

> "As a matter of semantics, there is simply no way to conclude that the word 'child' includes something else which is not a 'child', namely an unborn child. In legal terms, the unborn child is normally referred to as a fetus, or 'quick', or *in utero* and the court knows of no cases which confer a legal right on an unborn child as such, . . ."

The *Mixon* court went on to note:

> "The plaintiff's own expert, a recognized authority in the field of pre-natal medicine and pediatrics, testified that fetuses are never referred to medically or clinically as children, unborn or otherwise: . . . .
>
> . . . .
>
> "Certainly those members of Congress responsible for the drafting and passage of this legislation were not so naive, unversed or shortsighted in medical terminology to ignore or omit the term 'fetus' where it is alleged they specifically intended to include the same." *Mixon, supra,* at 54.

In explaining the provisions of the Social Security Act, prior to its enactment, Representative Ellenbogen addressed a joint session of the 74th Congress on May 20, 1935:

> "In our modern society, social security in its true sense means the enactment of laws that will safeguard the fundamentals of life to every human being from the *time of birth* until the time of death. . . .

> "The child-welfare laws and public-health measures which we pass should protect the child from the *day of his birth* until he reaches maturity." Cong. Rec., vol. 79, p. 7838 (emphasis added).

Mr. Ellenbogen in a subsequent address on the Social Security Act as it affected dependent children, re-emphasized the scope of coverage:

> "The idea will be security of the individual from birth to death." Cong. Rec., vol. 79, p. 13,678.

Section 402(a)(17), 42 U.S.C.A. §602(a)(17), requires states to undertake "in the case of a child *born* out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him. . . ." (Emphasis added.) This section clearly contemplates providing aid only in the case of born children.

In the 1972 amendments to the Social Security Act, Congress required HEW to take affirmative measures to assure that social security account numbers, to the maximum extent practicable, be assigned to appropriate groups including "any individual who is an applicant for or recipient of benefits under any program financed in whole or in part from Federal funds including any child on whose behalf such benefits are claimed by another person; . . . ." §205(c)(2)(B)(i)(II), 42 U.S.C.A. §405(c)(2)(B)(i)(II). The amendments further mandate HEW to "require of applicants for social security account numbers such evidence as may be necessary to establish the age, citizenship, or alien status, and true identity of such

applicants, and to determine which (if any) social security account number has previously been assigned to such individual." §205(c)(2)(B)(ii), 42 U.S.C.A. §405(c)(2)(B)(ii).

In requiring the assignment of social security account numbers to any child on whose behalf public assistance benefits are claimed, it stretches credulity beyond the breaking point to contend that Congress intended that social security account numbers be assigned to fetuses. Such intent is particularly improbable in view of the complementary requirement. It is obvious that the evidence necessary to establish age, citizenship or alien status and the true identity of any applicant may be adduced only upon birth.

Section 402(b) of the Act, 42 U.S.C.A. §602(b), similarly clarifies the congressional intent to provide aid only after birth. That section prohibits HEW from approving any state plan which imposes a residence requirement which denies aid to any child "who was *born* within one year immediately preceding the application. . . ." (Emphasis added.)

The intent of Congress to exclude fetuses from AFDC eligibility is further demonstrated by the fact that Title IV as originally enacted provided only for aid to children and did not include aid to caretaker relatives. C. 531, Title IV, §406, 49 Stat. 629. See *Parks v. Harden,* 354 F. Supp. 620, 624 (N.D. Ga. 1973).

It would seem to be a physiological impossibility to provide any kind of aid to a fetus without providing that aid to and through the prospective mother.

The structure of the statutory scheme providing aid to children makes for a case even stronger than *Roe v. Wade*, where this Court declared:

> "But in nearly all these instances the use of the word [person] is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application." 410 U.S. 113, 157.

Every application of the term "child" in federal statutes has logical application only to born children.

III

A FETUS IS NOT AN INDIVIDUAL AS CONTEMPLATED BY §402(a)(10)

In ordering the State of Iowa to provide AFDC to fetuses, the Court of Appeals relied principally on §402(a)(10), 42 U.S.C.A. §602(a)(10), which requires that AFDC "be furnished . . . to all eligible individuals. . . ." *Aleala v. Burns,* 494 F.2d 743, 745. Citing *Townsend v. Swank,* 404 U.S. 282, 286 (1971), *King v. Smith,* 392 U.S. 309 (1968), and *Carleson v. Remillard* 406 U.S. 598 (1972), the Court of Appeals stated that if those "cases are to govern, it must first be determined that unborn children are 'eligible'. . . ." *Id.*

That court unfortunately overlooked the other half of the §402(a)(10) equation. That section in referring to "eligible individuals" also requires a determination that fetuses are "individuals." In *Roe v. Wade,* this Court noted that the "pregnant woman cannot be

isolated in her privacy" 410 U.S. 113, 159. Neither, of course, can the fetus be isolated as an individual, separate and distinct and from the pregnant woman upon whom it is totally dependent. Neither the ordinary usage of the English language nor any other language of the Social Security Act suggests that the term "individual" would include a fetus. If a fetus is not a "person" within the meaning of the Constitution (*Roe v. Wade, supra,* at 157-158), it is surely not an individual within the meaning of §402(a)(10).

Further, the Court of Appeals' reliance on the *Townsend* Trilogy in its interpretation of §402(a)(10) was clearly misplaced. This section was interpreted in *Jefferson v. Hackney,* 406 U.S. 535, 544-545 (1972), with particular care given to limitation of the scope of the *Townsend* doctrine:

> "That section was enacted at a time when persons whom the State had determined to be eligible for the payment of benefits were placed on waiting lists, because of the shortage of state funds. The statute was intended to prevent the States from denying benefits, even temporarily, to a person who has been found fully qualified for aid. [Citation omitted.] Section 402(a)(10) also forbids a State from creating certain exceptions to standards specifically enunciated in the federal act. See e.g., *Townsend v. Swank,* 404 U.S. 282 (1971). It does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of need, income, and benefits. [Footnote omitted.] Such an interpretation would be an intrusion

into an area in which Congress has given the States broad discretion, and we cannot accept appellant's invitation to change this longstanding statutory scheme simply for policy reasons of which we are not the arbiter." *Accord, New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 421 (1973).

This Court in *Jefferson* read Section 402(a)(10) as barring states from creating certain exceptions to *specific* standards in the Act. In *Townsend, supra,* the issue was an Illinois statute which denied AFDC eligibility to children aged 18 through 20 who were in college. This was in direct conflict with Section 406(a)(2)(B) of the Act which specified eligibility for a child under age 21 who was a "student regularly attending a school, college, or university." In the case at hand, however, there is no provision in the Act which similarly specifies eligibility for fetuses. On the contrary, everything in the Act and other federal law indicates an intent not to provide such eligibility.

IV

CONSIDERATIONS OF SOCIAL POLICY ARE MORE PROPERLY LEFT TO CONGRESS

The basis of the Court of Appeals' decision appears to be that "the term 'dependent child' is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act." 494 F.2d at 746.

In effect, the court reaches this conclusion on the basis of two assumptions. First, that a fetus is

eligible for AFDC and secondly, that the *Townsend* Trilogy, therefore, requires provision of AFDC to fetuses. Nothing in the way of evidence, however, is offered to support the initial assumption of fetal eligibility. Unfortunately, this seems to be a common hazard in these series of cases.

The cases interpreting the Social Security Act as not including aid to the unborn cite a wealth of specific legislative history, case law, and complementary provisions of the Act. *Wisdom v. Norton,* ..... F.2d ..... (2d Cir. Doc. No. 74-1402, 1974); *Mixon v. Keller,* 372 F. Supp. 51 (M.D. Fla. 1974), *cert. denied,* ..... U.S. ....., 43 L.W. 3213; *Parks v. Harden,* 354 F. Supp. 620 (N.D. Ga. 1973); *Poole v. Endsley,* 371 F. Supp. 1379 (N.D. Fla. 1974). The cases interpreting the Act as requiring payment of AFDC to the unborn, cited by the Court of Appeals, 494 F.2d at 745, rely on generalities. Perhaps the most dramatic illustration of this dichotomy is demonstrated in *Wilson v. Weaver,* 499 F.2d 155 (7th Cir. 1974). The majority decided that inclusion of fetuses was warranted by the Act's policy of "encouraging the care of dependent children." 499 F.2d at 158.[1]

This may be compared with the dissent of Circuit Judge Pell who came to the opposite conclusion only after a scholarly analysis of common law, legislative

[1]The referenced policy, in §401, read in more complete context, refers to "encouraging the care of dependent children . . . by enabling each State to furnish financial assistance . . . to needy dependent children and the parent or relatives with whom they are *living*. . . ." 42 U.S.C.A. §601. (Emphasis added.) Thus, the policy relied on by the majority by its own terms applies only to living children.

history, supporting provisions of Title IV, and the *Townsend* Trilogy. The rationale in the case at bench appears to rest less on what the Act actually says than on what that court would prefer it to say. Unable to muster supporting authorities for either side, the Court of Appeals adopts the result that is most congenial to its social philosophy.

In a decision reversing the lower court's voiding of the Maryland method of limiting the amount of AFDC grants to large families, this Court declared:

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge v. Williams,* 397 U.S. 471, 487 (1970).

Whether or not the consistent policy of Congress in refusing to recognize fetuses as children, eligible in their own right to qualify for public benefits, be they citizenship, tax exemption or welfare, is the most wise, just and humane social and economic policy devisable, should not be the basis for decision. The expansion of benefits to fetuses in this case would of course be a precedent for judicial expansion of benefits to fetuses in every other federal program.

The weighing of the positive and negative factors in this type of program is far better suited to the extended consideration present in the legislative process than to the crowded caseload atmosphere of the courts.

CONCLUSION

The Court of Appeals has failed to take into consideration the strong congressional policy of declining to recognize fetuses as children. To let this decision stand will be an invitation to other courts to create new social and economic policies without the benefit of the normal balancing factors inherent in the legislative process. For this reason, Pacific Legal Foundation, as *amicus curiae*, urges that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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November 1974

SUPREME COURT, U. S.

NOV 20 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE AND JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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42 U.S.C. §605 ..... 2, 7
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45 C.F.R. §233.10(a) (1) (i) 2, 10
45 C.F.R. §233.90(a) 2
45 C.F.R. §233.90(c) (1) 2, 10
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Cong. Rec., Vol. 113, Part 17, 90th Cong., 1st Sess., p. 23,053 (1967) 9

MISCELLANEOUS:

2A, *Sutherland on Statutory Construction* §45.12 (4th ed. C. Dallas Sands 1973) 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

INDA ALCALA, JANE DOE and JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

Opinion Below

The Opinion of the United States District Court for the Southern District of Iowa, as originally filed, appears at page 18, Single Appendix, filed herein. That order, as later corrected, is reported at 362 F.Supp. 180 (S.D. Iowa 1973). The Opinion of the United States Court of Appeals for the Eighth Circuit was printed as Appendix A, page 1a, Petition For Writ of Certiorari, and has since been reported in 494 F.2d 743.

Jurisdiction

On the 29th day of March, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion [Appendix A, p. 1a, Petition For Writ] and Judgment [Single Appendix, p. 31, filed herein]. No Petition for Rehearing was filed but upon a Motion filed by Petitioners, a Stay of issuance of the mandate was granted on April 15, 1974, provided that

within thirty (30) days there was filed with the Clerk of the Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a Petition for Writ of Certiorari and record had been filed [Appendix B, p. 8a, Petition For Writ]. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Questions Presented

1. Does the policy of the State of Iowa, Department of Social Services, which denies Aid to Dependent Children Grants to an unborn child, conflict with the Social Security Act, thus contravening the Supremacy Clause of the United States Constitution?

2. Since the statutory language of Title 42 U.S.C. §606(a), which defines "dependent child", does not expressly provide that unborn children are included and the legislative history indicates that they are not included, can the Department of Health, Education and Welfare (HEW) or the judiciary mandate the states to include them?

Constitutional Provisions, Statutes and Regulations

The Supremacy Clause [Article VI, second paragraph]; 42 U.S.C. §606(a) of the Social Security Act; 42 U.S.C. §602(b) [but now obsoleted]; and 42 U.S.C. §603(d) [in P.L. 90-248, §208(b)] [since repealed]; and Federal Regulations 45 C.F.R. §233.90(a); §233.90(c) (1) and §233.90(c) (2) (ii) are set forth in Addendum B hereof.

Other pertinent portions of the Social Security Act: [42 U.S.C. §601; §602(a), (7), (8), (16) and (17); §604(b); §605 and §606(c)], appear in the brief proper at pp. 4, 6 & 7, and pertinent portions of other Federal Regulations [45 C.F.R. §233.10 (a) (1) (i) and §30(2)] appear in the brief proper at pp. 10 & 11.

Statement of the Case

The Respondents, Plaintiffs below, representing themselves and other pregnant women who are denied AFDC payments by reason of the interpretation by Petitioners, State of Iowa, of Title 42 U.S.C. §606(a) so as to not include an unborn child within the term "dependent child", sought a declaratory judgment that Petitioners' actions by reason of said interpretation were invalid as conflicting with the federal statute; Respondents further sought to enjoin the denial of AFDC payments on the basis above stated and sought retroactive monetary damages for assistance withheld.

Respondents also alleged violations of their due process and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution and jurisdiction of the District Court was invoked pursuant to Title 42 U.S.C. §1983, Title 28 U.S.C. §2201, and Title 28 U.S.C. §1343. The District and Circuit Courts found it unnecessary to reach the due process and equal protection issues.

None of the named Respondents had living children but all three

were pregnant. All three applied for AFDC to the County Director of Social Services of Scott County, Iowa, as residents of that county and were rejected. Their financial circumstances were such that had their child or children been born, a grant under Iowa's Aid to Dependent Children statute would have been approved. (Stipulated evidence)

The Circuit Court affirmed the decision of the United States District Court for the Southern District of Iowa, that unborn children were eligible under the Social Security Act to receive AFDC grants and that Iowa's exclusion violated the Supremacy Clause. (The judgment of the District Court had been stayed by the United States Supreme Court pending hearing by the Circuit Court by Stay Order, dated October 9, 1973, indexed in Application A-288.)

Summary of Argument

Petitioners review Title IV of the Social Security Act which prescribes the eligibility factors for "dependent children" entitled to receive a grant in the Aid to Families With Dependent Children Program. They also refer to and quote from pertinent portions of the available legislative history of the Act. They comment upon the HEW administrative interpretation that a grant to an unborn child is an optional provision which the States may adopt or reject but if adopted, federal financial participation would be "available". Additionally, pertinent judicial decisions are referred to and discussed.

From the above, Petitioners respectfully suggest that only one conclusion can be drawn, namely, that Congress intended a child to be born before it may be eligible for an AFDC grant, and that the Circuit Court erred in judicially mandating Iowa to include unborn children within its classification of eligible individuals.

Petitioners also draw attention to alternative forms of relief for the prospective mother, and in passing, suggest that the other constitutional questions, which the Court properly did not reach, can withstand the constitutional challenge.

Argument

DIVISION I
DISCUSSION OF OPINIONS BELOW

One can more easily ascertain how error crept into the Decision and Opinion when one analyzes the underlying thinking of the District Court as disclosed in its Memorandum Opinion.[1]

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[1] The District Court Opinion and Judgment was reported in 362 F.Supp. 180 after the Court in its Order of August 24, 1973, had corrected the word "prenatal" to parental".

First, the District Court misquoted Title 42 U.S.C. §601 by inserting the word "prenatal" for the correct and crucial word "parental", and underscored the word "prenatal" for emphasis. This set the whole tone of the Opinion.[2]

Section 601 reads:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum sulf-support and personal independence consistent with the maintenance of continuing parental [misquoted as prenatal] care and protection, . . .

Second, the District Court in referring to the statutory definition of "dependent child" to determine what was and what was not said, indicated that it was looking for words *expressly excluding* the unborn.[3] It should have been looking for express words of *inclusion*. Adopting this wrong premise as the starting point would naturally bring a wrong result. The inquiry should have been "who were expressly included". *Townsend v. Swank*, 404 U.S. 282 (1971) and *New York Department of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed. 2d 688 (1973).

The Court of Appeals not only failed to reverse the starting point of the District Court and correctly make inquiry as to whom is *expressly included* (not expressly excluded) within the term "dependent child" [42 U.S.C. §606(a)], but compounded the error in holding that the HEW regulation [45 C.F.R. §233.90(c) (2)(ii)] (viewed by HEW as merely optional), is mandatory and Iowa must therefore extend its Aid to Dependent Children program to include the unborn.

The Court of Appeals, after stating: "A triad of Supreme Court cases 'establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause' *Townsend v. Swank*, 404 U.S. 282, 286 (1971). See *King v. Smith*, 392 U.S.

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[2]Attorneys for Plaintiffs in an "unborn child" case, U.S. District Court for the Southern District of Nebraska, *Linda Jones, et al. v. Laurence L. Graham*, Director of Public Welfare, Civil No. 73-L-235 [see Exhibit G (Affidavit of E. D. Warnsholz, Attorney General of Nebraska), Application for Stay of Judgment Pending Appeal, filed herein on 9/17/73], in briefs and oral agruments cited the Social Security Act as misquoted by the U.S. District Court of Iowa.

[3]The Court on page 185 in remarking that the results differ depending upon which approach is used specifically rejected that used by Judge Smith in *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973), saying Judge Smith was "looking for a very specific inclusion of 'unborn' which he did not find." (In *Parks*, the court held that unborn are not covered.)

309 (1968); *Carleson v. Remillard*, 406 U.S. 598 (1972)", concluded that "the *King, Townsend* and *Remillard* cases, then, determine that defendants' interpretation of the welfare manual denying benefits to unborn children and their mothers, violates the Supremacy Clause and is invalid."

Both courts below completely disregarded the clarification of "the triad" in *New York State Department of Social Services v. Dublino*, supra, wherein this Court states at 93 S.Ct. 2517:

> ". . . in those cases [King-Townsend-Remillard, supra] it was clear that state law excluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible. . ." [Emphasis supplied.]

and in Footnote 29:

> ". . . and 'so long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them. *Jefferson* supra, at 541."

Perhaps this omission occurred under the misapprehension that Congress had *expressly* included the unborn since the Opinion, as originally filed, contained the misquoted word "prenatal" instead of "parental" as noted above. Instead of in some fashion dealing with *Dublino*, supra, the Court of Appeals in its conclusion said "We believe that the district court correctly concluded that the term 'dependent child' is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act."

Petitioners contend that this decision erodes, if not destroys, the cooperative federalism which this Court has repeatedly recognized as giving the States considerable latitude in allocating their AFDC resources. *King v. Smith*, supra, *Wyman v. James*, 400 U.S. 309 (1971), *Jefferson v. Hackney*, 406 U.S. 535 (1972).

DIVISION II

Congressional Intent

Petitioners sincerely believe that the language employed by Congress in setting forth the eligibility factors in Title IV, Aid to Families with Dependent Children [42 U.S.C. §606(a)] is clear and thus not susceptible of interpretation. *Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). As therein stated, "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain. . . the sole function of the courts is to enforce it according to its terms".

The Respondents here, under the claim of ambiguity or doubtful meaning and guise of statutory construction actually are asking the judiciary to enlarge the scope of eligibility in the AFDC program. Petitioners, however, contend that a search for a different meaning of the term "dependent child" than set forth in the Act itself returns one to the same premise enunciated in *Caminetti*, supra, i.e., that Congress used

plain words in the Social Security Act which should be enforced in their ordinary meaning. In support of their contention, Petitioners respectfully refer this Court to pertinent language in the Act, its legislative history, administrative interpretations and judicial decisions.

a. Statutory Language

Congress in 42 U.S.C. §606(a) enumerates the combination of eligibility factors one must possess to receive AFDC. Under the maxim *expressio unius est exclusio alterius*, a fetus is excluded.

Chief Justice John Marshall in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174, 2 L.Ed. 60, 72, while in a different factual setting, expressed the doctrine thusly:

> "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no sense."

Looking at the Act itself, we find no specific provision therein which requires a State to give an AFDC grant for an unborn child. Indeed only the contrary can be concluded.

The term "dependent child" in Title IV of the Social Security Act is said to mean a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and *who is living with* his father, mother, grandfather, grandmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, *in a place of residence maintained by one or more of such relatives as his or their own home* and (2) is (A) under the age of eighteen or (B) under the age of twenty-one (if attending school). [Emphasis supplied.] [42 U.S.C. §606(a)]

No sensible construction of this language would include a fetus, and it is a well established principle of statutory interpretation that the law favors rational and sensible construction. 2A *Sutherland on Statutory Construction* §45.12, p. 37 (4th ed. C. Dallas Sands 1973).

In giving effect to the term "dependent child" in §42 U.S.C. §606(a), a Court " 'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' *United States v. Boisdore's Heirs*, 8 How. 113, 122." *NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957).* Moreover, the Court has cautioned against accepting a construction of particular terms that "would produce incongruous results." Id. quoting *Mastro v. NLRB*, 350 U.S. 270, 286 (1956).

Throughout the entire Act and Amendments thereto, it will be observed that Congress uses language which is inoperative were it to be applied to a child not yet born. In various places Congress has said:

(1) "care of dependent children in their *own homes* or in the homes of relatives" and "with whom they are *living*. . ." [Title 42 U.S.C. 601] [Emphasis supplied];

(2) "in determining need, take into consideration income and resources of any child. . ." [42 U.S.C. 602 (a) (7)];

(3) "earned income of a dependent child" [42 U.S.C. 602 (a) (8) (A) (ii)];

(4) if "the *home* in which a *relative and child* receiving aid *reside* is unsuitable for the child. . . ." [42 U.S.C. 602(a) (16)] [Emphasis supplied.];

(5) "in the case of a child *born* out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him. . . ." [42 U.S.C. 606(a) (17) (A) (i)] [Emphasis supplied];

(6) "in respect to a child . . . *who was born*" [Title 42 U.S.C. 602 (b) (2) - relating to residence - now obsolete under the doctrine of "right to travel"] [Emphasis supplied.];

(7) "average number of *dependent children under the age of* 18 . . . with respect to whom payments under this section . . . made to a State . . . shall not exceed the number which bears the same *ratio to the total population of such State under the age of 18* on the first day of the year . . ." [P.L. 90-248 sec. 208 (b) added this section to 42 U.S.C. 603 as (d), now obsoleted by P.L. 91-411 sec. 3(a).] [Emphasis supplied];

(8) ". . . with respect to a child because of the conditions in the *home* in which the child resides . . ." [42 U.S.C. 604(b)]. [Emphasis supplied];

(9) "Whenever the State agency has reason to believe any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling, . . . or in seeking appointment of a guardian or legal representative . . ." [42 U.S.C. §605];

(10) "The term 'relative with whom any dependent child is living' means the individual who is one of the relatives specified in subsection (a) . . . with whom such child is living . . . in a place of residence maintained by such individual . . . as his own home." [42 U.S.C. 606(c)].

As can be readily observed, if the word "fetus" were substituted for the word "child" in any of the above-quoted provisions, a ridiculous meaning for the term "dependent child" would result. Thus, the only conclusion that can be drawn is that Congress was not including the fetus within its definition of the term "dependent child".

It should be observed, however, that Congress was not unmindful that in some cases pregnant women need health care as it expressly provides in Title V of the Social Security Act grants to States for "health care to prospective mothers (including after childbirth, health care to mothers and their infants)". [42 U.S.C. §708]

Additionally, Congress, in limiting the AFDC program to children (rather than fetuses) was undoubtedly aware that needy prospective

mothers would be granted alternative public assistance. Shelter, food, medical assistance and clothing are items included in Iowa's general relief program (Chapter 252, Code of Iowa, 1973). Congress in the food program, provides food stamps and double commodities for needy pregnant women.[4]

The form of alternative public assistance is more realistic as the payments thereunder are for the benefit of the prospective mother. A fetus would have no capabilities of utilizing the items which are included as needs of a child in an AFDC grant, i.e., shelter, utilities, supplies and replacements, clothing, personal care and supplies, medicine cabinet supplies and communications.[5]

b. Legislative History

Available legislative history of Title IV of the Social Security Act indicates that Congress invisioned AFDC benefits for living children only.

The purpose was said by the President of the United States to release the mother from the wage-earner role[6] and allow her to be present in the home to raise the young children.[7]

On May 20, 1935, prior to enactment of the Social Security Act, Representative Ellenbogen addressed a Joint Session of the 74th Congress saying:[8]

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[4]Single Appendix, p. 16. See also, 42 U.S.C. §1786 providing for a supplement food program to pregnant and lactating women and infants.

[5]Employees' Manual, Single Appendix, p. 17.

[6]Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 30 (1935):

> "These are not primarily aids to mothers but defense measures for children. They are designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society."

[7]S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). *See also* H.R. Rep. No. 615, 74th Cong., 1st Sess. 10-12 (1935):

> "Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been advised."

[8]Cong. Rec., Vol. 79, Part 7, pp. 7838-39

> "In our modern society, social security in its true sense means that enactment of laws that will safeguard the fundamentals of life to every human being *from the time of birth* until the time of death. . . .
>
> "The child-welfare laws and public-health measures which we pass should protect the child *from the day of his birth* until he reaches maturity. . . .
>
> ***
>
> "I visualize for the future social security laws which will accompany the individual from *his cradle* to his grave; social security laws which will step in and watch over the child *when it is born*; . . ." [Emphasis supplied.]

Subsequently, on August 20, 1935, in commenting on the Social Security Act relating to dependent children, Representative Ellenbogen stated:[9]

> "The idea will be security of the individual *from birth* to death. . . ." [Emphasis supplied.]

In discussing the Congressional residency requirement for AFDC [42 U.S.C. §602(b) – now obsolete], Representative Randolph on August 20, 1935 stated:[10]

> "Payments: Amount to be fixed by state. Those who qualify: Children who have lived at least one year in the State before making application; and *who were born* within the state one year immediately preceeding application if the mother had resided in the state one year immediately preceeding the birth." [Emphasis supplied.]

In his statements to the Congress, Representative Mills used the term "child population" saying:[11]

> "If they [states] will reduce the rolls as we expect . . . there is plenty of room within a percentage of the *child population* of that state to put any additional deserving family of children on the rolls." [Emphasis supplied.]

Worthy of note are two decisions of this Court citing the congressional history in this pertinent area. This Court in *King v. Smith*, 392 U.S. 309 (1968) at pp. 328-29, said:

> "The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as '[o]ne clearly distinguished group of children'. HR Rep. No. 615 74th Cong. 1st Sess. 10 (1935). This group was composed of children in families without a 'breadwinner', 'wage earner', or 'father' . . . a

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[9]Cong. Rec., Vol. 79, Part 13, p. 13,678

[10]Cong. Rec., Vol. 79, Part 13, p. 13,881

[11]Cong. Rec., Vol. 113, Part 17, August 17, 1967, 90th Congress, 1st Sess., p. 23,053

child would be eligible for assistance if his parent was deceased, incapacitated or continually absent."

And, in *Dandridge v. Williams*, 397 U. S. 471 (1970) at p. 495, the report of Senate Committee on Finances as to the purpose of the Social Security Act of 1935 is quoted as follows:

> "With no income coming in, and *with young children* for whom provision must be made for a number of years, families without a father's support require public assistance . . . Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions." [Emphasis supplied.]

c. Administrative Interpretation

The Department of Health, Education and Welfare explained in its Regulation 45 C.F.R. §233.10, captioned "General provisions regarding coverage and eligibility", that:

> (a) *State plan requirements.* A state plan under title . . . IV . . . of the Social Security Act must:
>
> (1)[11] *Specify the groups of individuals*, based on reasonable classifications, *that will be included* in the program, and all the conditions of eligibility that must be met by the individuals in the groups. Under this requirement:
>
> (i) . . . Although the public assistance titles define the coverage in which the Federal Government will participate financially, a State may provide coverage on a broader or more limited basis. . . . [Emphasis supplied.]

It then made specific provisions relating to the AFDC program in 45 C.F.R. §233.90[12] captioned "Factors specific to AFDC" with (c) thereunder captioned "Federal financial participation". It is significant that HEW divided this subparagraph (c) into two subparagraphs, the first being (c)(1).

In subparagraph (1), the regulation provides that financial participation is provided when all the *mandatory* requirements of a "dependent child" as defined in Title 42 U.S.C. §606(a) are met. However, in a separate subparagraph (c) (2), unrelated to "dependent child" as defined in the Act, HEW provided that "Federal financial participation is available in:

> (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis".

It should be observed that Congress itself actually defined the minimum age of a "dependent child" in terms of live birth in that part of the Social Security Act as originally enacted, 42 U.S.C. §602 (b)[13] which

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[11] 45 C.F.R. §233.90 is set out at p. 32, Addendum B hereto.

[12] Addendum B, p.31

was later declared by this court as contravening the fundamental right to travel *(Shapiro v. Thompson*, 394 U.S. 618). There, reference was made to a child "who has resided in the State for one year immediately preceding the application for such aid."

Likewise, HEW in 45 C.F.R. §30(2) defines the minimum age in terms of the birth of a live child. That regulation reads:

> (2) Federal determination of whether an individual meets the age requirements of the Social Security Act will be made according to the common-law method (under which a specific age is attained the day before the anniversary of birth), unless the State plan specifies that the popular usage method (under which an age is attained on the anniversary of birth), is used.

In the two *amicus* briefs furnished the Court, HEW characterized its own regulation for federal aid to the unborn as an "optional provision". That "optional provision", however, grew to be a mandatory Act of Congress by judicial decision.

If Congress had intended AFDC coverage to be that extensive, either as an option or as mandatory, *it* would have so legislated. HEW, by regulation, cannot vary the terms of the Act. *Townsend v. Swank*, supra.

d. Judicial Decisions

In none of the so-called triad, was there any effort, as here, to add another group to the classification, described in the Act.

In all three, there was a dependent child who met the statutory definition, regardless of the fact that its mother had a paramour living within the home *(King)*, or the fathers continued absence was for military service *(Remillard)* or the State statute failed to enumerate the type of school set forth in the Social Security Act *(Townsend)*.

For the courts below to mandate, as they did in this case, coverage for a new group is not only contrary to the triad upon which they relied, but also contrary to *Dublino*, which had been decided and although cited was not referred to by either court below.

On the other hand, except in *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973), decided six months before *Dublino*, and which distinguished the triad, the Courts in other jurisdicitons which held an unborn child was not a "dependent child"[14] did rely upon *Dublino*.

Dublino is of utmost importance for consideration not only in this, but future welfare litigation, for at 93 S.Ct. 2517, we read:

> ". . . Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.

[14]One U.S. Court of Appeals and four federal district courts have held unborn children were not covered. *Wisdom v. Norton* (2nd Cir., Oct. 11, 1974), unreported and thus printed herein at p.14, Addendum A; *Poole v. Endsley*, 371 F.Supp. 1379 (N.D. Fla. 1974); *Vivon v. Keller*, 372 F.Supp. 51 (M.D. Fla. 1974); *Murrow v. Clifford*, Civ. No. 114-73 D.N.J. June 12, 1973); *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973).

"In this context, the dissenting opinion's reliance on *Townsend v. Swank*, 404 U.S. 282 (1971), *Carleson v. Remillard*, 406 U.S. 598 (1972), and *King v. Smith*, supra is misplaced. In those cases it was clear that state law encluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible. . . ." [Emphasis supplied]

Again, in *Dublino*, we read at 93 S. Ct. 2513:

"This court has repeatedly refused to void state statutory programs, absent congressional intent to pre-empt them."

The Court then quoted from *Schwartz v. Texas*, 344 U.S. 199 (1952), saying:

"The exercise of federal supremacy is not lightly to be presumed"

and continuing at 93 S. Ct. 2513, we read:

"This same principle relates directly to state AFDC programs, where the Court already has acknowledged that States 'have considerable latitude in allocating their AFDC resources since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' *King v. Smith*, supra, at 318 - 319; *Dandridge v. Williams*, supra, at 478; *Jefferson v. Hackney*, supra at 541 . . ."

Previously, the Supreme Court in *Jefferson v. Hackney*, supra, stated:

"So long as the State's actions are not in violation of any specific provisions of the Constitution or the Social Security Act, the courts may not void them."

DIVISION III

Fifth and Fourteenth Amendment Claims

Since the Opinion and Judgment of the Court of Appeals turned on the statutory challenge, the Court properly did not reach the alleged violation of the Fifth and Fourteenth Amendments and, properly so, no arguments pertaining need be presented. In passing, however, Petitioners respectfully submit that a fetus has no civil rights to AFDC under the Fifth or Fourteenth Amendment. As this Court noted in *Roe v. Wade*, 410 U.S. 113 at 157 (1973), the word "person" used in the Constitution and its Amendments has no prenatal applications.

Further, this Court previously has held that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. . . . [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. . . . It is enough that the State's action be rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970).

Iowa has a legitimate interest in providing its available AFDC funds to children (as distinguished from fetuses) to meet their financial needs in instances where their 'breadwinner' has either left the home, is incapacitated or (since July, 1973) is unemployed, in the belief that this best serves the purpose of encouraging the care of dependent children in a home environment and helps "maintain and strengthen family life". [42 U.S.C. §601] Petitioners suggest that this withstands a constitutional challenge under the *Dandridge* rationale.

Conclusion

In the light of the language in the Social Security Act and in the light of *Roe v. Wade*, supra, it is difficult to see how the courts below could have decreed a fetus the right to receive AFDC benefits.

For the foregoing reasons, the Judgment of the Court of Appeals should be reversed and Petitioners respectfully suggest that, to minimize further litigation with varying results in numerous judicial districts, perhaps this Court should make final disposition of all claims made by Respondents in their Complaints.

Respectfully submitted,

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ADDENDUM A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1058—September Term, 1973

(Argued May 29, 1974 Decided October 11, 1974.)

Docket No. 74-1402

BARBARA WISDOM, ANNA TIRADO, and JANE CROE, individually and on behalf of their unborn children and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

NICHOLAS NORTON, Commissioner of Welfare, State of Connecticut and VINCENT B. CAPUANO, Director of Eligibility Services of the Connecticut State Welfare Department,

Defendants-Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges,*
WEINFELD,* *District Judge.*

Appeal from an order of the District Court for the District of Connecticut, Hon. Robert C. Zampano, *Judge*, granting plaintiffs a declaratory judgment and enjoining the State of Connecticut from failing to furnish benefits under the Aid to Families with Dependent Children pro-

* Of the Southern District of New York, sitting by designation.

visions of the Social Security Act, 42 U.S.C. section 601 *et seq.*, to plaintiffs for their unborn children.

Reversed.

FRANCIS J. MACGREGOR, Assistant Attorney General, Hartford, Connecticut (Robert K. Killian, Attorney General for the State of Connecticut, Hartford, Connecticut, of counsel), *for Appellants.*

MARILYN KAPLAN KATZ, Bridgeport, Connecticut (Bridgeport Legal Services, Inc., Bridgeport, Connecticut, and Diane Schneiderman, New Haven Legal Assistance Association, New Haven, Connecticut, of counsel), *for Appellees.*

WEINFELD, *District Judge:*

This appeal presents the question whether an unborn child is eligible for assistance under the Aid to Families with Dependent Children ("AFDC") provisions of Title IV of the Social Security Act of 1935, as amended,[1] and if so, whether the policy of the State of Connecticut of denying such assistance to the unborn child and its pregnant mother is in conflict with the Act and thus invalid under the Supremacy Clause of the United States Constitution.[2]

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1 42 U.S.C. § 601 *et seq.* (1970).

2 To date, 4 courts of appeals and 10 district courts, including the court below, have held that unborn children are entitled to AFDC benefits. *Carter* v. *Hooker*, 43 U.S.L.W. 2037 (1st Cir., July 18, 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973); *Wilson* v. *Weaver*, 499 F.2d 155 (7th Cir. 1974), *aff'g* 358 F. Supp. 1147 (N.D. Ill. 1973) *and Green* v. *Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973); *Alcala* v. *Burns*, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973), *petition for cert. filed*, 42 U.S.L.W. 3683 (U.S. June 11, 1974); *Doe* v. *Lukhard*, 493 F.2d 54 (4th Cir. 1974), *aff'g* 363 F. Supp. 823

Appellees, plaintiffs in the courts below, commenced this action seeking declaratory and injunctive relief on behalf of themselves and all others similarly situated with regard to the State of Connecticut's policy denying AFDC benefits for unborn children to otherwise eligible pregnant women. In substance, the complaint alleges that this policy violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, as well as the Social Security Act and regulations promulgated thereunder, and thus is invalid under the Supremacy Clause.[3] When this suit was instituted, one of the three named plaintiffs was receiving AFDC assistance on the basis of her two children who were living with her, but was denied AFDC benefits for her unborn child; the other two named plaintiffs were not receiving any AFDC assistance. The defendants are the Commissioner of Welfare for the State of Connecticut and the Director of Eligibility Services for the Welfare Department.

(E.D. Va. 1973), *petition for cert. filed*, 43 U.S.L.W. 3075 (U.S. Aug. 18, 1974); *Wisdom* v. *Norton*, 372 F. Supp. 1190 (D. Conn. 1974); *Stuart* v. *Canary*, 367 F. Supp. 1343 (N.D. Ohio 1973); *Whitfield* v. *Minter*, 368 F. Supp. 798 (D. Mass. 1973); *Jones* v. *Graham*, Civ. No. 73-L-235 (D. Neb., Sept. 5, 1973); *Harris* v. *Mississippi State Dept. of Public Welfare*, 363 F. Supp. 1293 (N.D. Miss. 1973). In addition, two other district courts have granted preliminary injunctions against state denials of AFDC benefits to the unborn. *Tapia* v. *Powell*, Civ. No. 73-B-169 (S.D. Tex., Nov. 4, 1973); *Tillman* v. *Endsley*, No. 73-1476-Civ.-CF (S.D. Fla., Oct. 1, 1973). Four federal district courts have held that unborn children are not covered. *Poole* v. *Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974); *Mixon* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), *pet. for cert. filed in advance of judgment in 5th Cir.*, 43 U.S.L.W. 3095 (U.S. Aug. 7, 1974); *Murrow* v. *Clifford*, Civ. No. 114-73 (D.N.J. June 12, 1973); *Parks* v. *Harden*, 374 F. Supp. 620 (N.D. Ga. 1973).

3 Any question as to the jurisdiction of the federal courts to hear this suit has been settled by the Supreme Court's decision in *Hagans* v. *Lavine*, 415 U.S. 528 (1974).

The district court consolidated plaintiffs' motion for a preliminary injunction with the trial on the merits,[4] and after hearing testimony and ruling that the prerequisites of a valid class action had been met pursuant to sections (a) and (b)(2) of Rule 23 of the Federal Rules of Civil Procedure, granted judgment for the plaintiffs.[5] The district court stayed its judgment and order pending a decision on appeal by this court.

I.

Section 402(a)(10) of the Act requires that ". . . aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."[6] Section 406(a) of the Act provides, *inter alia*, that AFDC benefits shall be paid to a needy "'dependent child' . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with"[7] any one of several listed persons. The Act is silent as to aid to an unborn child. However, the Department of Health, Education and Welfare adopted an administrative practice first under an audit policy[8] and later promulgated a regulation whereby the federal government reimbursed a state, which at its option extended such benefits to "an unborn child when the fact of pregnancy has been determined by medical diagnosis."[9] Connecticut, as have thirty-

4 *See* Fed. R. Civ. P. 65(a)(2).

5 372 F. Supp. 1190 (D. Conn. 1974).

6 42 U.S.C. § 602(a)(10).

7 42 U.S.C. § 606(a).

8 HEW, Handbook of Public Assistance Administration, § 3412.6 (Nov. 3, 1946).

9 45 C.F.R. § 233.90(c)(2)(vi) (1972).

four other jurisdictions, has elected not to pay benefits to unborn children; nineteen jurisdictions have opted to do so. The basic issue, however, centers about the Act and not the regulation.

The district court held the state policy at issue here invalid under the Supremacy Clause of the United States Constitution because it is inconsistent with the eligibility provisions of the Social Security Act.[10] Since states cannot vary the eligibility requirements of AFDC and exclude from its benefits individuals intended to be covered,[11] our inquiry must focus on whether an unborn child is a "dependent child" within the meaning of the Act and therefore entitled to AFDC benefits.

Neither section 406(a) nor any other provision of the Act explicitly includes or excludes an unborn child. As

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10 The court summarized the reasons for its holding:

> 1. The definition of "child" includes a "fetus," an "unborn human being," and an "unborn infant."
>
> 2. The medical evidence clearly indicated that inclusion of the unborn child as a "dependent child" is consistent with the purposes of the Act.
>
> 3. No credible argument can be advanced that Congress intended to exclude an unborn child from coverage of the Act. An unborn child is not any less "needy" or "dependent" than a child who has been born.
>
> 4. HEW regulations have permitted payments to unborn children; the optional features of the administrative regulations, however, are violative of the provisions of the Act.
>
> 5. Both houses of the 92nd Congress proposed amendments to the Act which would have excluded unborn children, but the amendments were not enacted.
>
> 6. In the absence of express congressional authorization, a state policy that excludes persons eligible for assistance under federal standards is in conflict with the Act and is invalid under the Supremacy Clause. 372 F. Supp. 1190, 1192 (D. Conn. 1974).

11 *Carleson* v. *Remillard*, 406 U.S. 598, 600 (1972); *Townsend* v. *Shank*, 404 U.S. 282, 286 (1971); *King* v. *Smith*, 392 U.S. 309, 313 (1968).

has been cogently argued elsewhere,[12] the language of various sections of Title IV makes sense only if the term "child" is limited to those who are born. The statutory scheme supports the view that Congress did not intend to confer welfare benefits to children until they were born. For example, section 401 states the purpose of the AFDC program as "encouraging the care of dependent children in their own homes or in the homes of relatives . . . ."[13] Clearly it is impossible to encourage the care of an unborn child in the home of a relative. So, too, sections 402(a)(7) and (8) of the Act require consideration of a child's income and resources in establishing the amount of assistance.[14] A fetus, of course, has no income. The foregoing, as well as other provisions of the Act—for example, sections 402(a)(11), 402(a)(13) through (15), 402(a)(16),[15] all of which concern living children, give strong support to the view that the "dependent child" referred to in section 406(a) was intended to apply only to one that was born. Appellees' counter argument that where identical words are used in a statute with quite different meanings[16] it is the duty of the courts to give the words different meanings, is quite unpersuasive in light of the overall purpose of Title IV, as reflected by the sections referred to above.

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12 *Miron* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974); *Parks* v. *Harden*, 354 F. Supp. 620, 625 (N.D. Ga. 1973). *See also Wilson* v. *Weaver*, slip opinion Nos. 73-1541, -1749, -1834, -1835 at 9 (7th Cir., May 9, 1974) (Pell, *J.*, dissenting).

13 42 U.S.C. § 601.

14 42 U.S.C. § 602(a)(7) and (8).

15 42 U.S.C. §§ 602(a)(11), 602(a)(13) through (15), 602(a)(16).

16 *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932).

Appellees, however, citing definitions in several dictionaries, argue that the ordinary meaning of "child" includes an unborn child.[17] Appellants argue contrariwise, citing other dictionaries in support of their contention that under ordinary definitions the word "child" does not mean an "unborn child."[18]

This battle of dictionaries appears to be a stalemate. Nevertheless, application of the "ordinary meaning"[19] rule in this case would seem to bear against appellees' position. "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."[20] We are of the view that the word "child" is commonly and ordinarily understood to mean a born child and not a fetus. Indeed, when it is intended to refer to a fetus it is usually modified by another word such as "unborn child." Another example—when enumerating one's offspring it is common to say, where appropriate, "I have two children and one on the way," not "I have three chil-

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17 The American Heritage Dictionary of the English Language (1969); The Shorter Oxford English Dictionary (1933); Webster's New Twentieth Century Dictionary (Unabridged) (2d ed. 1970); Webster's Unabridged Dictionary (2d ed. 1969).

18 Funk & Wagnalls Standard Dictionary, International Edition (1958); The Random House Dictionary of the English Language (Unabridged) (1966); Rogets International Thesaurus (3d ed. 1962); Black's Law Dictionary (4th ed. 1951); Webster's Third International Dictionary (1969); Ballentine's Law Dictionary (3d ed. 1969).

19 *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 36 (1922); *DeGanay* v. *Lederer*, 250 U.S. 376, 381 (1919).

20 *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944). *See also Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925): "[T]he plain, obvious and rational meaning of a statute is always preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

dren." Common usage permits the conclusion that while a fetus is more than a non child, it is something less than a child—a view which finds support in the Supreme Court's ruling in *Roe* v. *Wade*,[21] which refused to recognize that a fetus prior to the final trimester of pregnancy has rights separate from those of its mother.

We will assume, however, that the various dictionary definitions of "child" create sufficient ambiguity as to the meaning of that word as used in the AFDC provisions to justify turning to the legislative history of the Social Security Act for guidance. Appellees urge that inclusion of the unborn within the definition of "dependent child" furthers the underlying purpose of the Act of "encouraging the care of dependent children." This is hardly open to dispute—indeed, many other provisions could be read into the Act which would further that underlying policy. However desirable such additions might be, they involve legislative policy considerations and are beyond the scope of the judicial function. The issue is whether Congress intended to extend the benefits of the Act to an unborn child. The entire thrust of Title IV is in furtherance of the interests of living and dependent children. Congress manifested no concern at the time the statute was enacted or in subsequent amendments with making funds available for the benefit of unborn children.

When the Social Security Act was discussed and debated prior to its enactment, what was to become the AFDC program was viewed as a counterpart to, and a federally funded extension of, state statutes known as "mothers' aid" or "mothers' pension" laws. These laws were described as follows:

> "These are not primarily aids to mothers but defense measures for children. They are designed to release

[21] 410 U.S. 113 (1973).

> from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society." [22]

Another report stated the following about these laws and the proposed AFDC program:

> "Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been devised." [23]

Finally, Title IV of the Act emphasizes that it was designed "for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives." Thus, it is apparent that an essential purpose of AFDC was to provide assistance to children who were fatherless or whose absent father failed to provide support so that the mother would be released from a wage-earning role and she would remain at home, supervising their upbringing and preventing them from falling into delinquency.[24] Indeed, so strong was that policy, that

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22 Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 30 (1935).

23 S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). *See also* H.R. Rep. No. 615, 74th Cong., 1st Sess. 10-12 (1935).

24 While the AFDC provisions have been amended several times during the intervening years, including in 1962, a change in the title of the program from its original "Aid to Dependent Children" to the present

Congress in 1950 amended the Act so that the aid would include payments "to meet the needs of the relative with whom any dependent child is living." [25] It is equally apparent that this concern that the mother be in the home to raise the child only comes into play once the child is born. On the other hand, the principal purpose to be served by making payments for an unborn child would be the care of its mother during the pregnancy by providing nutrition, medication and health care, which no doubt would be beneficial to the unborn child. The Social Security Act at the time of its passage included a separate program which provides payments for maternal and pre-natal health care, but it does so in Title V,[26] not in Title IV which contains the AFDC provisions.[27] For example, section 508(a) of Title V of the Act[28] authorizes federal grants to state agencies and private agencies in support of projects providing "necessary health care to prospective mothers (including, after child birth, health care for mothers and their infants) who have or are likely to have conditions associated with child bearing . . . ."

"Aid to Families with Dependent Children," *see* Pub. L. No. 87-543, 76 Stat. 172, 185 (1962), there is no evidence that the purpose of the program—promoting the home life of dependent children and their fostering by their mothers or other relatives—has changed. *See* 42 U.S.C. § 601 (1970).

25 42 U.S.C. § 606(b)(1).

26 42 U.S.C. § 701 et seq. (1970).

27 We do not bring attention to Title V with the idea that including unborn children in AFDC would necessarily be inconsistent with providing funds for maternal health care in Title V. To the contrary, as already noted, it would not only be consistent with but it would further the general policy of the entire Act. The significance of Title V for our purposes is as evidence—rather strong evidence when combined with the language and purpose of the AFDC provisions—of a congressional intent *not* to include unborn children under AFDC but to provide for maternity care in a different section of the statute.

28 42 U.S.C. § 708(a).

We conclude that the language and purpose of the AFDC provisions and the structure of the Social Security Act indicate that unborn children were not intended to be included in AFDC. We are also of the view that the omission of language in the statute and the absence of legislative history specifically excluding (or, for that matter, including) unborn children from coverage is because Congress never contemplated that they be eligible for AFDC benefits. It is manifest that had Congress intended to include unborn children within the definition of "dependent children," in all likelihood it would have expressed itself in clear and unambiguous language.[29]

Appellees place great reliance on a trilogy of Supreme Court cases striking down state legibility restrictions for AFDC benefits.[30] These cases may be summed up as holding that "at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."[31] Appellees contend that these cases require inclusion of unborn children in AFDC because fetuses are not specifically excluded from coverage. In a subsequent decision, however, the Court clarified the trilogy rule as applicable to those cases where "it was clear that state law excluded people from AFDC benefits who the Social Security Act expressly provided would be eligible."[32] The

29 *Cf. New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 414 (1973).

30 *Carleson* v. *Remillard*, 406 U.S. 598 (1972); *Townsend* v. *Swank*, 404 U.S. 282 (1971); *King* v. *Smith*, 392 U.S. 309 (1968).

31 *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971).

32 *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973).

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Act does not expressly provide that the unborn are eligible; moreover, we have rejected appellees' argument that the unborn come within the Act's definition of "dependent child." Hence the trilogy rule does not apply here.

We do, however, agree with both appellees and appellants that the Department of Health, Education and Welfare ("HEW") is incorrect in its policy of allowing payments to unborn children at the option of the participating states. If unborn children are eligible under the Social Security Act for AFDC payments, the trilogy cases clearly prevent the states from granting or withholding these payments at their options, since the Act itself does not provide such an option. If, on the other hand, unborn children are not eligible under the Act for AFDC benefits, HEW has no authority to approve such optional payments. The Act as to unborn children is either mandatory or it is not; either they are eligible or not eligible as "dependent children." Since we hold that unborn children are not eligible for AFDC, HEW exceeded its authority in granting states the option to make such payments under the Social Security Act.[33]

Appellees contend that we should nonetheless give great weight to the fact that HEW regulations permit AFDC payments to unborn children[34]—although the optional aspect of these payments is invalid—since HEW is the federal agency charged with the program's administration. However, if HEW has incorrectly construed the Social Security Act to permit optional AFDC payments to unborn children, it may also have misconstrued it in ruling

33 In this respect, we disagree with two other courts that have upheld state denials of AFDC benefits to the unborn. *See Poole* v. *Endsley*, 371 F. Supp. 1379, 1383 (N.D. Fla. 1974); *Parks* v. *Harden*, 354 F. Supp. 620, 625-26 (N.D. Ga. 1973).

34 45 C.F.R. §§ 233.90(c)(2)(ii), (c)(3) (1973).

that such payments are permissible under the Act at all. While the construction of a statute by the agency charged with administering it is entitled to be given weight, "in the end, after whatever reserve, upon the courts rests the ultimate responsibility of declaring what a statute means."[35] We are convinced that our construction of the statute is correct, and decline to follow the HEW regulation to the extent that payments thereunder of AFDC benefits for unborn children are authorized by the Social Security Act.[36] Moreover, reliance upon the administrative regulation as reflecting Congressional purpose to include an unborn child within the definition of a "dependent child" is misplaced. HEW has expressly disavowed that under the Act an unborn child is within the definition of a needy "dependent child." Its position is that the regulation under which federal financial participation is made available, at the state's option, in payments on behalf of unborn children is an exercise of administrative discretion authorized by the Secretary's broad rule-making authority pursuant to section 1102 of the Act.[37] Specifically with respect to that regulation, HEW is of the view "that Congress did not intend to include unborn children within the definition

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35 *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (2d Cir.), (L. Hand, *J.*), *aff'd*, 328 U.S. 275 (1946). *See also Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

36 This conviction is strengthened by the analysis of the court in *Parks* v. *Harden*, 354 F. Supp. 620, 625 n.5 (N.D. Ga. 1973), of the genesis of HEW's policy allowing AFDC payments to unborn children. According to that court, the policy stemmed from a decision by the Social Security Board to waive an audit exception to payments made to unborn children by the State of Wisconsin. Thus, it appears to have originated as an *ad hoc* decision to defer to a state's policy, rather than as a rule based on an interpretation of the federal statute.

37 42 U.S.C. § 1302.

of 'dependent child' contained in section 406(a) of the Act." [38]

Finally, appellees rely on the fact that committees in both Houses of the 92nd Congress proposed an amendment to 42 U.S.C., section 606(a), that would have explicitly excluded the unborn from the term "dependent child."[39] The amendment was not enacted.[40] Appellees interpret this as congressional recognition of the HEW policy and acknowledgment of the correctness of HEW's construction of section 606(a). Another court, however, has pointed out that "the reason the legislation was not passed was because the Congress decided to deal only with the Adult Categories of Public Assistance in [the law that was finally enacted, and] [t]herefore, all references to AFDC were set aside at that time." [41] Moreover, Congress' failure to enact the proposed amendment at that time—or to enact a similar amendment at any other time—may just as logically be interpreted as acquiescence in HEW's policy of making AFDC payments to the unborn optional, a policy which, if upheld, would defeat appellees' statutory claim. "In any event, unsuccessful attempts at legislation are not the best guides to legislative intent"[42]—certainly not as to the intent of the 74th Congress which passed the legislation here at issue.[43] We can discern no clear meaning from the 92nd

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38 Supplemental brief submitted on behalf of HEW in *Adams* v. *Hueeker*, U.S.D.C., W.D. Ky. at 9 (May 2, 1974).

39 *See* H.R. No. 92-231, 92nd Cong., 1st Sess. 184 (1971); S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 467 (1972).

40 *See* Pub. L. No. 92-603, 86 Stat. 1329 (1972).

41 *Mixon* v. *Keller*, 372 F. Supp. 51, 55 (M.D. Fla. 1974).

42 *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 382 n.11 (1969).

43 *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-82 (1947).

Congress' failure to enact the proposed amendment, and for our purposes ascribe no significance to it.

In sum, with deference to the four courts of appeals who have held otherwise, we hold that Connecticut's denial of AFDC benefits to unborn children does not conflict with the Social Security Act.

II.

Since we reverse the district court's holding that Connecticut's policy conflicts with the Social Security Act, we next consider appellees' claim that this state policy of denying AFDC assistance to unborn children violates the Equal Protection Clause of the Fourteenth Amendment.

Appellees originally demanded that a three-judge district court be convened pursuant to 28 U.S.C., section 2281, but the district court's resolution of the pendent statutory claim[44] eliminated the need to consider convening a three-judge court to pass upon the equal protection issue.

Appellees' constitutional attack on the statewide policy of Connecticut's Welfare Department is within the scope of section 2281[45] and the issue is neither "wholly insubstantial" nor "obviously frivolous" so as to avoid under normal circumstances the need to convene a three-judge district court to decide the constitutional issue.[46] Nevertheless, we decline to remand this case to the district judge for him to convene a three-judge district court under 28 U.S.C., section 2284.

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44 *See Hagans* v. *Lavine*, 415 U.S. 528 (1974).

45 *Board of Regents* v. *New Left Education Project*, 404 U.S. 541, 544 n.2, 545 (1972); *Ortiz* v. *Colon*, 477 F.2d 135 (1st Cir. 1973); *Rothblum* v. *Board of Trustees*, 474 F.2d 891 (3d Cir. 1973). *See also Phillips* v. *United States*, 312 U.S. 246, 251 (1940).

46 *Goosby* v. *Osser*, 409 U.S. 512, 518-19 (1973); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); *Ex parte Poresky*, 290 U.S. 30, 32 (1923).

In view of our conclusion that AFDC statutory provisions do not permit, much less authorize, payments to the unborn, there is no reason to remand the constitutional question for determination by a three-judge district court when the result is foreordained since that court, bound as it would be by our determination of the statutory issue,[47] would have to deny the equal protection claim. It would be a waste of judicial manpower and of the litigants' time and resources to require that a three-judge district court go through the ritual of relying on our decision here to reject—as it would have to—appellees' constitutional argument. This conclusion strikes us as particularly appropriate and consistent with the historical purpose of section 2281, which was enacted for the protection of the states from the judgment of a single district judge,[48] a purpose that would not be served by a remand in this case. True, this action deprives appellees of a direct appeal to the Supreme Court from a three-judge court,[49] but Supreme Court review of our decision is available through the device of certiorari, which appears likely, given the status of the litigation on this issue in the various circuits and the already pending petitions for certiorari.[50] Moreover, the direct appeal provision appears "far more likely to have been for the benefit of the state than for the plaintiff."[51]

Turning to the merits of appellees' constitutional claim, we assume, without deciding, that appellees would be en-

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47 *Lewis* v. *Rockefeller*, 431 F.2d 368, 371 (2d Cir. 1970).

48 *Seergy* v. *Kings County Republican County Comm.*, 459 F.2d 308, 313 (2d Cir. 1973).

49 28 U.S.C. § 1253.

50 *See* note 2, *supra*.

51 *Astro Cinema Corp., Inc.* v. *Mackell*, 422 F.2d 293, 298 (2d Cir. 1970); *cf.* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

titled to AFDC benefits in their own behalf rather than in behalf of their unborn children. Essentially, the equal protection claim is based upon alleged discrimination in denying to them, as mothers of unborn children, the AFDC benefits and payments that are provided to all other children and their mothers. The Supreme Court has held that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Further, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. . . . It is enough that the State's action be rationally based and free from invidious discrimination."[53] Connecticut's policy of denying AFDC benefits to the unborn easily meets that test. Appellees do not allege that it is invidiously discriminatory in a constitutional sense, and the classification is a rational means of advancing the purpose of the AFDC program: encouraging the presence of a relative in the home of a dependent child to supervise the child's upbringing.

The judgment of the district court is reversed.

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52 Appellants contend that appellees can only receive benefits in behalf of their children, and since the Supreme Court ruled in *Roe* v. *Wade*, 410 U.S. 113, 158 (1973), that a fetus is not a "person" for the purposes of the Fourteenth Amendment, appellees' unborn children cannot maintain a claim under the equal protection clause.

53 *Dandridge* v. *Williams*, 397 U.S. 471, 485-87 (1970); *see Jefferson* v. *Hackney*, 406 U.S. 535, 545-51 (1972).

ADDENDUM B

Constitutional Provisions

Article VI, second paragraph [Supremacy Clause]:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes and Regulations

Title 42 U.S.C. §606(a):

> The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

42 U.S.C. 602(b):

> (b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceeding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth. [Obsoleted, *Shapiro v. Thompson*, 394 U.S. 618]

42 U.S.C. 603(d):

> (d) Notwithstanding any other provision of this Act, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any calendar quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such

State under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such State under the age of 18 on that date. [Repealed, P.L. 91-41 §3(a), July 9, 1969, 83 Stat. 45.]

45 C.F.R. §233.90 Factors specific to AFDC.

(a) *State plan requirement.* A state plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. . . .

***

(c) *Federal financial participation.*

(1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child", as defined in section 406(a) of the Act, is available within the following interpretations:

(i) Needy child deprived by reason of. The phrase "needy child * * * by reason of" requires that both need and deprivation of parental support or care exist in the individual case . . .

(ii) *Death of a parent.* If either parent of a child is deceased, . . .

(iii) *Continued absence of the parent from the home.* Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, . . .

(iv) *Physical or mental incapacity.* "Physical or mental incapacity" of a parent may be deemed to exist . . .

(v) *Living with [a specified relative] in a place of residence maintained* * * * as his * * * own home. (a) a child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

(1) Any blood relative, including . . .

***

(b) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuation of responsibility for day to day care of the child by the relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, . . .

***

(2) *Federal financial participation is available in:* [Emphasis supplied]

***

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

***

ADDENDUM C

Certificate of Service

I, Lorna Lawhead Williams, Special Assistant Attorney General for the State of Iowa, hereby certify that on the 18th day of November, 1974, I mailed one (1) manuscript copy of BRIEF FOR PETITIONERS and that on the 25th day of November, 1974, three (3) printed copies of BRIEF FOR PETITIONERS were mailed, correct postage prepaid, to:

Mr. Robert Bartels
College of Law
University of Iowa
Iowa City, Iowa 52242
Attorney for Respondents

I further certify that all parties required to be served have been served.

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319

Attorney for Petitioners

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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

LINDA ALCALA, JANE DOE AND JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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IN THE
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OCTOBER TERM, 1974

NO. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

vs.

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Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

Opinion Below

The Opinion of the United States District Court for the Southern District of Iowa, as originally filed, appears at page 18, Single Appendix, filed herein. That order, as later corrected, is reported at 362 F.Supp. 180 (S.D. Iowa 1973). The Opinion of the United States Court of Appeals for the Eighth Circuit was printed as

Appendix A, page 1a, Petition For Writ of Certiorari, and has since been reported in 494 F.2d 743.

Jurisdiction

On the 29th day of March, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion [Appendix A, p. 1a, Petition For Writ] and Judgment [Single Appendix, p. 31, filed herein]. No Petition for Rehearing was filed but upon a Motion filed by Petitioners, a Stay of issuance of the mandate was granted on April 15, 1974, provided that within thirty (30) days there was filed with the Clerk of the Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a Petition for Writ of Certiorari and record had been filed [Appendix B, p. 8a, Petition For Writ]. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Questions Presented

1. Does the policy of the State of Iowa, Department of Social Services, which denies Aid to Dependent Children Grants to an unborn child, conflict with the Social Security Act, thus contravening the Supremacy Clause of the United States Constitution?

2. Since the statutory language of Title 42 U.S.C. §606(a), which defines "dependent child", does not expressly provide that unborn children are included and the legislative history indicates that they are not included, can the Department of Health, Education and Welfare (HEW) or the judiciary mandate the states to include them?

Constitutional Provisions, Statutes and Regulations

The Supremacy Clause [Article VI, second paragraph]; 42 U.S.C. §606(a) of the Social Security Act; 42 U.S.C. §602(b) [but now obsoleted]; and 42 U.S.C. §603(d) [in P.L. 90-248, §208(b)] [since repealed]; and Federal Regulations 45 C.F.R. §233.90(a);

§233.90(c) (1) and §233.90(c) (2) (ii) are set forth in Addendum B hereof.

Other pertinent portions of the Social Security Act: [42 U.S.C. §601; §602(a), (7), (8), (16) and (17); §604(b); §605 and §606(c)], appear in the brief proper at pp. 5, 9 & 10, and pertinent portions of other Federal Regulations [45 C.F.R. §233.10 (a) (1) (i) and §30(2)] appear in the brief proper at pp. 14 & 15.

Statement of the Case

The Respondents, Plaintiffs below, representing themselves and other pregnant women who are denied AFDC payments by reason of the interpretation by Petitioners, State of Iowa, of Title 42 U.S.C. §606(a) so as to not include an unborn child within the term "dependent child", sought a declaratory judgment that Petitioners' actions by reason of said interpretation were invalid as conflicting with the federal statute; Respondents further sought to enjoin the denial of AFDC payments on the basis above stated and sought retroactive monetary damages for assistance withheld.

Respondents also alleged violations of their due process and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution and jurisdiction of the District Court was invoked pursuant to Title 42 U.S.C. §1983, Title 28 U.S.C. §2201, and Title 28 U.S.C. §1343. The District and Circuit Courts found it unnecessary to reach the due process and equal protection issues.

None of the named Respondents had living children but all three were pregnant. All three applied for AFDC to the County Director of Social Services of Scott County, Iowa, as residents of that county and were rejected. Their financial circumstances were such that had their child or children been born, a grant under Iowa's Aid to Dependent Children statute would have been approved. (Stipulated evidence)

The Circuit Court affirmed the decision of the United States District Court for the Southern District of Iowa, that unborn children were eligible under the Social Security Act to receive

AFDC grants and that Iowa's exclusion violated the Supremacy Clause. (The judgment of the District Court had been stayed by the United States Supreme Court pending hearing by the Circuit Court by Stay Order, dated October 9, 1973, indexed in Application A-288.)

Summary of Argument

Petitioners review Title IV of the Social Security Act which prescribes the eligibility factors for "dependent children" entitled to receive a grant in the Aid to Families With Dependent Children Program. They also refer to and quote from pertinent portions of the available legislative history of the Act. They comment upon the HEW administrative interpretation that a grant to an unborn child is an optional provision which the States may adopt or reject but if adopted, federal financial participation would be "available". Additionally, pertinent judicial decisions are referred to and discussed.

From the above, Petitioners respectfully suggest that only one conclusion can be drawn, namely, that Congress intended a child to be born before it may be eligible for an AFDC grant, and that the Circuit Court erred in judicially mandating Iowa to include unborn children within its classification of eligible individuals.

Petitioners also draw attention to alternative forms of relief for the prospective mother, and in passing, suggest that the other constitutional questions, which the Court properly did not reach, can withstand the constitutional challenge.

Argument

DIVISION I
DISCUSSION OF OPINIONS BELOW

One can more easily ascertain how error crept into the Decision and Opinion when one analyzes the underlying thinking of the District Court as disclosed in its Memorandum Opinion.[1]

[1] The District Court Opinion and Judgment was reported in 362 F. Supp. 180 after the Court in its Order of August 23, 1973, had corrected the word "prenatal" to "parental".

First, the District Court misquoted Title 42 U.S.C. §601 by inserting the word "prenatal" for the correct and crucial word "parental", and underscored the word "prenatal" for emphasis. This set the whole tone of the Opinion.[2]

Section 601 reads:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum sulf-support and personal independence consistent with the maintenance of continuing parental [misquoted as prenatal] care and protection. . . .

Second, the District Court in referring to the statutory definition of "dependent child" to determine what was and what was not said, indicated that it was looking for words *expressly excluding* the unborn.[3] It should have been looking for express words of *inclusion*. Adopting this wrong premise as the starting point would naturally bring a wrong result. The inquiry should have been "who were expressly included". *Townsend v. Swank*, 404 U.S. 282 (1971) and *New York Department of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed. 2d 688 (1973).

---

[2] Attorneys for Plaintiffs in an "unborn child" case, U.S. District Court for the Southern District of Nebraska, *Linda Jones, et al. v. Lawrence L. Graham*, Director of Public Welfare, Civil No. 73-L-235 [see Exhibit G (Affidavit of E. D. Warnsholz, Ass't. Attorney General of Nebraska), Application for Stay of Judgment Pending Appeal, filed herein on 9/17/73], in briefs and oral arguments cited the Social Security Act as misquoted by the U.S. District Court of Iowa.

[3] The Court on page 185 in remarking that the results differ depending upon which approach is used specifically rejected that used by Judge Smith in *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973), saying Judge Smith was "looking for a very specific inclusion of 'unborn' which he did not find." (In *Parks*, the court held that unborn are not covered.)

The Court of Appeals not only failed to reverse the starting point of the District Court and correctly make inquiry as to whom is *expressly included* (not expressly excluded) within the term "dependent child" [42 U.S.C. §606(a)], but compounded the error in holding that the HEW regulation [45 C.F.R. §233.90(c) (2) (ii)] (viewed by HEW as merely optional), is mandatory and Iowa must therefore extend its Aid to Dependent Children program to include the unborn.

The Court of Appeals, after stating: "A triad of Supreme Court cases 'establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause' *Townsend v. Swank*, 404 U.S. 282, 286 (1971). See *King v. Smith*, 392 U.S. 309 (1968); *Carleson v. Remillard*, 406 U.S. 598 (1972)", concluded that "the *King*, *Townsend* and *Remillard* cases, then, determine that defendants' interpretation of the welfare manual denying benefits to unborn children and their mothers, violates the Supremacy Clause and is invalid."

Both courts below completely disregarded the clarification of "the triad" in *New York State Department of Social Services v. Dublino*, supra, wherein this Court states at 93 S.Ct. 2517:

> ". . . in those cases [King-Townsend-Remillard, supra] it was clear that state law excluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible. . ." [Emphasis supplied.]

and in Footnote 29:

> ". . . and 'so long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them. *Jefferson* supra, at 541."

Perhaps this omission occurred under the misapprehension

that Congress had *expressly* included the unborn since the Opinion, as originally filed, contained the misquoted word "prenatal" instead of "parental" as noted above. Instead of in some fashion dealing with *Dublino*, supra, the Court of Appeals in its conclusion said "We believe that the district court correctly concluded that the term 'dependent child' is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act."

Petitioners contend that this decision erodes, if not destroys, the cooperative federalism which this Court has repeatedly recognized as giving the States considerable latitude in allocating their AFDC resources. *King v. Smith*, supra, *Wyman v. James*, 400 U.S. 309 (1971), *Jefferson v. Hackney*, 406 U.S. 535 (1972).

DIVISION II

Congressional Intent

Petitioners sincerely believe that the language employed by Congress in setting forth the eligibility factors in Title IV, Aid to Families with Dependent Children [42 U.S.C. §606(a)] is clear and thus not susceptible of interpretation. *Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). As therein stated, "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain. . . the sole function of the courts is to enforce it according to its terms".

The Respondents here, under the claim of ambiguity or doubtful meaning and guise of statutory construction actually are asking the judiciary to enlarge the scope of eligibility in the AFDC program. Petitioners, however, contend that a search for a different meaning of the term "dependent child" than set forth in the Act itself returns one to the same premise enunciated in *Caminetti*, supra, i.e., that Congress used plain words in the Social Security Act which should be enforced in their ordinary meaning. In support of their contention, Petitioners respectfully refer this Court to

pertinent language in the Act, its legislative history, administrative interpretations and judicial decisions.

a. Statutory Language

Congress in 42 U.S.C. §606(a) enumerates the combination of eligibility factors one must possess to receive AFDC. Under the maxim *expressio unius est exclusio alterius*, a fetus is excluded.

Chief Justice John Marshall in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174, 2 L.Ed. 60, 72, while in a different factual setting, expressed the doctrine thusly:

> "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no sense."

Looking at the Act itself, we find no specific provision therein which requires a State to give an AFDC grant for an unborn child. Indeed only the contrary can be concluded.

The term "dependent child" in Title IV of the Social Security Act is said to mean a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and *who is living with* his father, mother, grandfather, grandmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, *in a place of residence maintained by one or more of such relatives as his or their own home* and (2) is (A) under the age of eighteen or (B) under the age of twenty-one (if attending school). [Emphasis supplied.] [42 U.S.C. §606(a)]

No sensible construction of this language would include a fetus, and it is a well established principle of statutory interpretation that the law favors rational and sensible construction. 2A *Sutherland on Statutory Construction* §45.12, p. 37 (4th ed. C. Dallas Sands 1973).

In giving effect to the term "dependent child" in §42 U.S.C. §606(a), a Court " 'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law,

and to its object and policy.' *United States v. Boisdore's Heirs*, 8 How. 113, 122." *NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957).* Moreover, the Court has cautioned against accepting a construction of particular terms that "would produce incongruous results." Id. quoting *Mastro v. NLRB*, 350 U.S. 270, 286 (1956).

Throughout the entire Act and Amendments thereto, it will be observed that Congress uses language which is inoperative were it to be applied to a child not yet born. In various places Congress has said:

(1) "care of dependent children in their *own homes* or in the homes of relatives" and "with whom they are *living*. . ." [Title 42 U.S.C. 601] [Emphasis supplied];

(2) "in determining need, take into consideration income and resources of any child. . ." [42 U.S.C. 602 (a) (7)];

(3) "earned income of a dependent child" [42 U.S.C. 602 (a) (8) (A) (ii)];

(4) if "the *home* in which a *relative and child* receiving aid *reside* is unsuitable for the child. . . ." [42 U.S.C. 602(a) (16)] [Emphasis supplied.];

(5) "in the case of a child *born* out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him. . . ." [42 U.S.C. 606(a) (17) (A) (i)] [Emphasis supplied];

(6) "in respect to a child . . . *who was born*" [Title 42 U.S.C. 602 (b) (2) - relating to residence - now obsolete under the doctrine of "right to travel"] [Emphasis supplied.];

(7) "average number of *dependent children under the age of* 18 . . . with respect to whom payments under this section . . . made to a State . . . shall not exceed the number which bears the same *ratio to the total population of such State under the age of 18* on the first day of the year . . ." [P.L. 90-248 sec. 208 (b) added this section

to 42 U.S.C. 603 as (d), now obsoleted by P.L. 91-411 sec. 3(a).] [Emphasis supplied];

(8) ". . . with respect to a child because of the conditions in the *home* in which the child resides . . ." [42 U.S.C. 604(b)]. [Emphasis supplied];

(9) "Whenever the State agency has reason to believe any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling, . . . or in seeking appointment of a guardian or legal representative . . ." [42 U.S.C. §605];

(10) "The term 'relative with whom any dependent child is living' means the individual who is one of the relatives specified in subsection (a) . . . with whom such child is living . . . in a place of residence maintained by such individual . . . as his own home." [42 U.S.C. 606(c)].

As can be readily observed, if the word "fetus" were substituted for the word "child" in any of the above-quoted provisions, a ridiculous meaning for the term "dependent child" would result. Thus, the only conclusion that can be drawn is that Congress was not including the fetus within its definition of the term "dependent child".

It should be observed, however, that Congress was not unmindful that in some cases pregnant women need health care as it expressly provides in Title V of the Social Security Act grants to States for "health care to prospective mothers (including after childbirth, health care to mothers and their infants)". [42 U.S.C. §708]

Additionally, Congress, in limiting the AFDC program to children (rather than fetuses) was undoubtedly aware that needy prospective mothers would be granted alternative public assistance. Shelter, food, medical assistance and clothing are items included in Iowa's general relief program (Chapter 252, Code of Iowa, 1973).

Congress in the food program, provides food stamps and double commodities for needy pregnant women.[4]

The form of alternative public assistance is more realistic as the payments thereunder are for the benefit of the prospective mother. A fetus would have no capabilities of utilizing the items which are included as needs of a child in an AFDC grant, i.e., shelter, utilities, supplies and replacements, clothing, personal care and supplies, medicine cabinet supplies and communications.[5]

b. Legislative History

Available legislative history of Title IV of the Social Security Act indicates that Congress invisioned AFDC benefits for living children only.

The purpose was said by the President of the United States to release the mother from the wage-earner role[6] and allow her to be present in the home to raise the young children.[7]

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[4]Single Appendix, p. 16. See also, 42 U.S.C. §1786 providing for a supplement food program to pregnant and lactating women and infants.

[5]Employees' Manual, Single Appendix, p. 1..

[6]Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 30 (1935):

> "These are not primarily aids to mothers but defense measures for children. They are designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society."

[7]S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). *See also* H.R. Rep. No. 615, 74th Cong., 1st Sess. 10-12 (1935):

> "Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been advised."

On May 20, 1935, prior to enactment of the Social Security Act, Representative Ellenbogen addressed a Joint Session of the 74th Congress saying:[8]

> "In our modern society, social security in its true sense means that enactment of laws that will safeguard the fundamentals of life to every human being *from the time of birth* until the time of death. . . .
>
> "The child-welfare laws and public-health measures which we pass should protect the child *from the day of his birth* until he reaches maturity. . . .
>
> ***
>
> "I visualize for the future social security laws which will accompany the individual from *his cradle* to his grave; social security laws which will step in and watch over the child *when it is born*; . . ." [Emphasis supplied.]

Subsequently, on August 20, 1935, in commenting on the Social Security Act relating to dependent children, Representative Ellenbogen stated:[9]

> "The idea will be security of the individual *from birth* to death. . . ." [Emphasis supplied.]

In discussing the Congressional residency requirement for AFDC [42 U.S.C. §602(b) - now obsolete], Representative Randolph on August 20, 1935 stated:[10]

> "Payments: Amount to be fixed by state. Those who qualify: Children who have lived at least one year in the State before making application; and *who were born* within the state one year immediately preceeding application if the mother had resided in the state one year immediately preceeding the birth." [Emphasis supplied.]

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[8] Cong. Rec., Vol. 79, Part 7, pp. 7838-39
[9] Cong. Rec., Vol. 79, Part 13, p. 13,678
[10] Cong. Rec., Vol. 79, Part 13, p. 13,881

In his statements to the Congress, Representative Mills used the term "child population" saying:[11]

> "If they [states] will reduce the rolls as we expect . . . there is plenty of room within a percentage of the *child population* of that state to put any additional deserving family of children on the rolls." [Emphasis supplied.]

Worthy of note are two decisions of this Court citing the congressional history in this pertinent area. This Court in *King v. Smith*, 392 U.S. 309 (1968) at pp. 328-29, said:

> "The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners. It was designed to protect what the House Report characterized as '[o]ne clearly distinguished group of children'. HR Rep. No. 615 74th Cong. 1st Sess. 10 (1935). This group was composed of children in families without a 'breadwinner', 'wage earner', or 'father' . . . a child would be eligible for assistance if his parent was deceased, incapacitated or continually absent."

And, in *Dandridge v. Williams*, 397 U. S. 471 (1970) at p. 495, the report of Senate Committee on Finances as to the purpose of the Social Security Act of 1935 is quoted as follows:

> "With no income coming in, and *with young children* for whom provision must be made for a number of years, families without a father's support require public assistance . . . Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions." [Emphasis supplied.]

c. Administrative Interpretation

The Department of Health, Education and Welfare explained in its Regulation 45 C.F.R. §233.10, captioned "General provisions regarding coverage and eligibility", that:

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[11] Cong. Rec., Vol. 113, Part 17, August 17, 1967, 90th Congress, 1st Sess., p. 23,053

> (a) *State plan requirements.* A state plan under title . . . IV . . . of the Social Security Act must:
>
> (1) *Specify the groups of individuals,* based on reasonable classifications, *that will be included* in the program, and all the conditions of eligibility that must be met by the individuals in the groups. Under this requirement:
>
> (i) . . . Although the public assistance titles define the coverage in which the Federal Government will participate financially, a State may provide coverage on a broader or more limited basis. . . . [Emphasis supplied.]

It then made specific provisions relating to the AFDC program in 45 C.F.R. §233.90[12] captioned "Factors specific to AFDC" with (c) thereunder captioned "Federal financial participation". It is significant that HEW divided this subparagraph (c) into two subparagraphs, the first being (c)(1).

In subparagraph (1), the regulation provides that financial participation is provided when all the *mandatory* requirements of a "dependent child" as defined in Title 42 U.S.C. §606(a) are met. However, in a separate subparagraph (c) (2), unrelated to "dependent child" as defined in the Act, HEW provided that "Federal financial participation is available in:

> (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis".

It should be observed that Congress itself actually defined the minimum age of a "dependent child" in terms of live birth in that part of the Social Security Act as originally enacted, 42 U.S.C. §602 (b)[13] which was later declared by this court as contravening the fundamental right to travel *(Shapiro v. Thompson,* 394 U.S. 618). There, reference was made to a child "who has resided in the State for one year immediately preceding the application for such aid."

Likewise, HEW in 45 C.F.R. §30 (2) defines the minimum age in terms of the birth of a live child. That regulation reads:

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[12] 45 C.F.R. §233.90 is set out at p.36, Addendum B hereto.
[13] Addendum B, p.35

(2) Federal determination of whether an individual meets the age requirements of the Social Security Act will be made according to the common-law method (under which a specific age is attained the day before the anniversay of birth), unless the State plan specifies that the popular usage method (under which an age is attained on the anniversary of birth), is used.

In the two *amicus* briefs furnished the Court, HEW characterized its own regulation for federal aid to the unborn as an "optional provision". That "optional provision", however, grew to be a mandatory Act of Congress by judicial decision.

If Congress had intended AFDC coverage to be that extensive, either as an option or as mandatory, *it* would have so legislated. HEW, by regulation, cannot vary the terms of the Act. *Townsend v. Swank*, supra.

d. Judicial Decisions

In none of the so-called triad, was there any effort, as here, to add another group to the classification, described in the Act.

In all three, there was a dependent child who met the statutory definition, regardless of the fact that its mother had a paramour living within the home *(King)*, or the fathers continued absence was for military service *(Remillard)* or the State statute failed to enumerate the type of school set forth in the Social Security Act *(Townsend)*.

For the courts below to mandate, as they did in this case, coverage for a new group is not only contrary to the triad upon which they relied, but also contrary to *Dublino*, which had been decided and although cited was not referred to by either court below.

On the other hand, except in *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973), decided six months before *Dublino*, and which distinguished the triad, the Courts in other jurisdicitons which held

an unborn child was not a "dependent child"[14] did rely upon *Dublino*.

Dublino is of utmost importance for consideration not only in this, but future welfare litigation, for at 93 S.Ct. 2517, we read:

> ". . . Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.
>
> "In this context, the dissenting opinion's reliance on *Townsend v. Swank*, 404 U.S. 282 (1971), *Carleson v. Remillard*, 406 U.S. 598 (1972), and *King v. Smith*, supra is misplaced. In those cases it was clear that state law encluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible. . . ." [Emphasis supplied]

Again, in *Dublino*, we read at 93 S. Ct. 2513:

> "This court has repeatedly refused to void state statutory programs, absent congressional intent to pre-empt them."

The Court then quoted from *Schwartz v. Texas*, 344 U.S. 199 (1952), saying:

> "The exercise of federal supremacy is not lightly to be presumed"

and continuing at 93 S. Ct. 2513, we read:

> "This same principle relates directly to state AFDC programs, where the Court already has acknowledged that States have considerable latitude in allocating their AFDC resources since each State is free to set its own standard of need and to determine the level of benefits by the amount of

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[14] One U.S. Court of Appeals and four federal district courts have held unborn children were not covered. *Wisdom v. Norton* (2nd Cir., Oct. 11, 1974), unreported and thus printed herein at p.19, Addendum A; *Poole v. Endsley*, 317 F.Supp. 1379 (N.D. Fla. 1974); *Mixon v. Keller*, 372 F.Supp. 51 (M.D. Fla. 1974); *Murrow v. Clifford*, Civ. No. 114-73 (D.N.J. June 12, 1973); *Parks v. Harden*, 354 F.Supp. 620 (N.D. Ga. 1973).

> funds it devotes to the program.' *King v. Smith*, supra, at 318 - 319; *Dandridge v. Williams*, supra, at 478; *Jefferson v. Hackney*, supra at 541 . . ."

Previously, the Supreme Court in *Jefferson v. Hackney*, supra, stated:

> "So long as the State's actions are not in violation of any specific provisions of the Constitution or the Social Security Act, the courts may not void them."

DIVISION III

Fifth and Fourteenth Amendment Claims

Since the Opinion and Judgment of the Court of Appeals turned on the statutory challenge, the Court properly did not reach the alleged violation of the Fifth and Fourteenth Amendments and, properly so, no arguments pertaining need be presented. In passing, however, Petitioners respectfully submit that a fetus has no civil rights to AFDC under the Fifth or Fourteenth Amendment. As this Court noted in *Roe v. Wade*, 410 U.S. 113 at 157 (1973), the word "person" used in the Constitution and its Amendments has no prenatal applications.

Further, this Court previously has held that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. . . . [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. . . . It is enough that the State's action be rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970).

Iowa has a legitimate interest in providing its available AFDC funds to children (as distinguished from fetuses) to meet their financial needs in instances where their 'breadwinner' has either left the home, is incapacitated or (since July, 1973) is

unemployed, in the belief that this best serves the purpose of encouraging the care of dependent children in a home environment and helps "maintain and strengthen family life". [42 U.S.C. §601] Petitioners suggest that this withstands a constitutional challenge under the *Dandridge* rationale.

Conclusion

In the light of the language in the Social Security Act and in the light of *Roe v. Wade*, supra, it is difficult to see how the courts below could have decreed a fetus the right to receive AFDC benefits.

For the foregoing reasons, the Judgment of the Court of Appeals should be reversed and Petitioners respectfully suggest that, to minimize further litigation with varying results in numerous judicial districts, perhaps this Court should make final disposition of all claims made by Respondents in their Complaints.

Respectfully submitted,

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ADDENDUM A

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 1058--September Term, 1973

(Argued May 29, 1974 Decided October 11, 1974.)

Docket No. 74-1402

BARBARA WISDOM, ANNA TIRADO, AND JANE CROE, individually and on behalf of their unborn children and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

NICHOLAS NORTON, Commissioner of Welfare, State of Connecticut and VINCENT B. CAPUANO, Director of Eligibility Services of the Connecticut State Welfare Department,

Defendants-Appellants.

Before:

MOORE AND FEINBERG, *Circuit Judges,*
WEINFELD,* *District Judge.*

Appeal from an order of the District Court for the District of Connecticut, Hon. Robert C. Zampano, *Judge*, granting plaintiffs a

*Of the Southern District of New York, sitting by designation.

declaratory judgment and enjoining the State of Connecticut from failing to furnish benefits under the Aid to Families with Dependent Children provisions of the Social Security Act, 42 U.S.C. section 601 *et seq.*, to plaintiffs for their unborn children.

Reversed.

FRANCIS J. MAC GREGOR, Assistant Attorney General, Hartford, Connecticut (Robert K. Killian, Attorney General for the State of Connecticut, Hartford, Connecticut, of counsel), *for Appellants.*

MARILYN KAPLAN KATZ, Bridgeport, Connecticut (Bridgeport Legal Services, Inc., Bridgeport, Connecticut, and Diane Schneiderman, New Haven Legal Assistance Association, New Haven, Connecticut, of counsel), *for Appellees.*

WEINFELD, *District Judge:*

This appeal presents the question whether an unborn child is eligible for assistance under the Aid to Families with Dependent Children ("AFDC") provisions of Title IV of the Social Security Act of 1935, as amended,[1] and if so, whether the policy of the State of Connecticut of denying such assistance to the unborn child and its pregnant mother is in conflict with the Act and thus invalid under the Supremacy Clause of the United States Constitution.[2]

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[1] 42 U.S.C. §601 et seq. (1970).

[2] To date, 4 courts of appeals and 10 district courts, including the court below, have held that unborn children are entitled to AFDC benefits. *Carter v. Hooker*, 43 U.S.L.W. 2057 (1st Cir. July 18, 1974), *aff'g* 369 F. Supp. 204 (D.N.H. 1973); *Wilson v. Weaver*, 490 F.2d 155 (7th Cir. 1974), *aff'g* 358 F. Supp. 1147 (N.D. Ill. 1973) *and Green v. Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973); *Heala v. Burns*, 494 F.2d 743 (8th Cir. 1974), *aff'g* 362 F. Supp. 180 (S.D. Iowa 1973), *petition for cert. filed*, 42 U.S.L.W. 3683 (U.S. June 11, 1974); *Doe v. Lukhard*, 493 F.2d 54 (4th Cir. 1974), *aff'g* 363 F. Supp. 823 (E.D. Va. 1973), *petition for cert. filed*, 43 U.S.L.W. 3075 (U.S. Aug. 18, 1974); *Wisdom v. Norton*, 372 F. Supp. 1190 (D. Conn. 1974);

Appellees, plaintiffs in the courts below, commenced this action seeking declaratory and injunctive relief on behalf of themselves and all others similarly situated with regard to the State of Connecticut's policy denying AFDC benefits for unborn children to otherwise eligible pregnant women. In substance, the complaint alleges that this policy violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, as well as the Social Security Act and regulations promulgated thereunder, and thus is invalid under the Supremacy Clause.[3] When this suit was instituted, one of the three named plaintiffs was receiving AFDC assistance on the basis of her two children who were living with her, but was denied AFDC benefits for her unborn child; the other two named plaintiffs were not receiving any AFDC assistance. The defendants are the Commissioner of Welfare for the State of Connecticut and the Director of Eligibility Services for the Welfare Department.

The district court consolidated plaintiffs' motion for a preliminary injunction with the trial on the merits,[4] and after hearing testimony and ruling that the prerequisites of a valid class action had been met pursuant to sections (a) and (b) (2) of Rule 23

Stuart v. Canary, 367 F. Supp. 1343 (N.D. Ohio 1973), *Whitfield v. Hunter*, 368 F. Supp. 798 (D. Mass. 1973), *Jones v. Graham*, Civ. No. 73-L-235 (D. Neb., Sept. 5, 1973), *Harris v. Mississippi State Dept. of Public Welfare*, 363 F. Supp. 1293 (N.D. Miss. 1973). In addition, two other district courts have granted preliminary injunctions against state denials of AFDC benefits to the unborn. *Tapia v. Lovell*, Civ. No. 73-B-169 (S.D. Tex., Nov. 4, 1973); *Tillman v. Endsley*, No. 73-1476-Civ.-CF (S.D. Fla., Oct. 1, 1973). Four federal district courts have held that unborn children are not covered. *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974); *Maxon v. Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), *pet. for cert. filed in advance of judgment in 5th Cir.*, 43 U.S.L.W. 3005 (U.S. Aug. 7, 1974); *Marrow v. Clifford*, Civ. No. 114-73 (D.N.J. June 12, 1973); *Parks v. Harden*, 354 F. Supp. 620 (N.D. Ga. 1973).

[3] Any questions as to the jurisdiction of the federal courts to hear this suit has been settled by the Supreme Court's decision in *Hagans v. Lavine*, 415 U.S. 528 (1974).

[4] See Fed. R. Civ. P. 65(a)(2).

of the Federal Rules of Civil Procedure, granted judgment for the plaintiffs.[2] The district court stayed its judgment and order pending a decision on appeal by this court.

I.

Section 402(a)(10) of the Act requires that ". . . aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."[3] Section 406(a) of the Act provides, *inter alia*, that AFDC benefits shall be paid to a needy "'dependent child' . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with"[4] any one of several listed persons. The Act is silent as to aid to an unborn child. However, the Department of Health, Education and Welfare adopted an administrative practice first under an audit policy[5] and later promulgated a regulation whereby the federal government reimbursed a state, which at its option extended such benefits t "an unborn child when the fact of pregnancy has been determined by medical diagnosis."[6] Connecticut, as have thirty-four other jurisdictions, has elected not to pay benefits to unborn children; nineteen jurisdictions have opted to do so. The basic issue, however, centers about the Act and not the regulation.

The district court held the state policy at issue here invalid under the Supremacy Clause of the United States Constitution because it is inconsistent with the eligibility provisions of the Social

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[2] 372 F. Supp. 1190 (D. Conn. 1974).

[3] 42 U.S.C. §602(a)(10).

[4] 42 U.S.C. §606(a).

[5] HEW, Handbook of Public Assistance Administration, §3412.6 (Nov. 4, 1946).

[6] 45 C.F.R. §233.90(c)(2)(ii) (1973).

Security Act. Since states cannot vary the eligibility requirements of AFDC and exclude from its benefits individuals intended to be covered,[11] our inquiry must focus on whether an unborn child is a "dependent child" within the meaning of the Act and therefore entitled to AFDC benefits.

Neither section 406(a) nor any other provisions of the Act explicitly includes or excludes an unborn child. As has been cogently argued elsewhere,[12] the language of various sections of Title IV makes sense only if the term "child" is limited to those who are born. The statutory scheme supports the view that Congress did not intend to confer welfare benefits to children until they were born. For example, section 401 states the purpose of the AFDC program as "encouraging the care of dependent children in their

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[11] The court summarized the reasons for its holding:

> 1. The definition of "child" includes a "fetus," an "unborn human being," and an "unborn infant."
>
> 2. The medical evidence clearly indicated that inclusion of the unborn child as a "dependent child" is consistent with the purposes of the Act.
>
> 3. No credible argument can be advanced that Congress intended to exclude an unborn child from coverage of the Act. An unborn child is not any less "needy" or "dependent" than a child who has been born.
>
> 4. HEW regulations have permitted payments to unborn children; the optional features of the administrative regulations, however, are violative of the provisions of the Act.
>
> 5. Both houses of the 92nd Congress proposed amendments to the Act which would have excluded unborn children, but the amendments were not enacted.
>
> 6. In the absence of express congressional authorization, a state policy that excludes persons eligible for assistance under federal standards is in conflict with the Act and is invalid under the Supremacy Clause. 372 F. Supp. 1190, 1192 (D. Conn. 1974).

Carleson v. Remillard, 406 U.S. 598, 600 (1972); *Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309, 313 (1968).

[12] *Mixon v. Keller*, 372 F. Supp. 51 (M.D. Fla. 1974); *Parks v. Harden*, 354 F. Supp. 620, 625 (N.D. Ga. 1973). *See also Wilson v. Weaver*, slip opinion Nos. 73-1541, 1749, 1834, 1835 at 6 (7th Cir., May 9, 1974) (Pell, J., dissenting).

own homes or in the homes of relatives . . . ." Clearly it is impossible to encourage the care of an unborn child in the home of a relative. So, too, sections 402(a)(7) and (8) of the Act require consideration of a child's income and resources in establishing the amount of assistance.[14] A fetus, of course, has no income. The foregoing, as well as other provisions of the Act--for example, sections 402(a)(11), 402(a)(13) through (15), 402(a)(16),[15] all of which concern living children, give strong support to the view that the "dependent child" referred to in section 406(a) was intended to apply only to one that was born. Appellees' counter argument that where identical words are used in a statute with quite different meanings[16] it is the duty of the courts to give the words different meanings, is quite unpersuasive in light of the overall purpose of Title IV, as reflected by the sections referred to above.

Appellees, however, citing[17] definitions in several dictionaries, argue that the ordinary meaning of "child" includes an unborn child.[18] Appellants argue contrariwise, citing other dictionaries in support of their contention that under ordinary definitions the word "child" does not mean an "unborn child."[18]

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[14] 42 U.S.C. §601.

[15] 42 U.S.C. §602(a)(7) and (8).

[16] 42 U.S.C. §§602(a)(11), 602(a)(13) through (15), 602(a)(16).

[17] *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

[18] The American Heritage Dictionary of the English Language (1969); The Shorter Oxford English Dictionary (1933); Webster's New Twentieth Century Dictionary (Unabridged) (2d ed. 1970); Webster's Unabridged Dictionary (2d ed. 1969).

[18] Funk & Wagnalls Standard Dictionary, International Edition (1958); The Random House Dictionary of the English Language (Unabridged) (1966); Roget's International Thesaurus (3d ed. 1962); Black's Law Dictionary (4th ed. 1951); Webster's Third International Dictionary (1969); Ballentine's Law Dictionary (3d ed. 1969).

This battle of dictionaries appears to be a stalemate. Nevertheless, application of the "ordinary meaning" rule in this case would seem to bear against appellees' position. "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."[20] We are of the view that the word "child" is commonly and ordinarily understood to mean a born child and not a fetus. Indeed, when it is intendend to refer to a fetus it is usually modified by another word such as "unborn child." Another example--when enumerating one's offspring it is common to say, where appropriate, "I have two children and one on the way," not "I have three children." Common usage permits the conclusion that while a fetus is more than a non-child, it is something less than a child--a view which finds support in the Supreme Court's ruling in *Roe v. Wade*,[21] which refused to recognize that a fetus prior to the final trimester of pregnancy has rights separate from those of its mother.

We will assume, however, that the various dictionary definitions of "child" create sufficient ambiguity as to the meaning of that word as used in the AFDC provisions to justify turning to the legislative history of the Social Security Act for guidance. Appellees urge that inclusion of the unborn within the definitions of "dependent child" furthers the underlying purpose of the Act of "encouraging the care of dependent children." This is hardly open

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[20] *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36 (1922); *DeGanay v. Lederer*, 250 U.S. 376, 381 (1919).

[21] *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944). *See also Lynch v. Ainsworth-Stephens Co.*, 267 U.S. 364, 370 (1925): "[T]he plain, obvious and rational meaning of a statute is always preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

[22] 410 U.S. 113 (1973).

to dispute. Indeed, many other provisions could be read into the Act which would further that underlying policy. However desirable such additions might be, they involve legislative policy considerations and are beyond the scope of the judicial function. The issue is whether Congress intended to extend the benefits of the Act to an unborn child. The entire thrust of Title IV is in furtherance of the interests of living and dependent children. Congress manifested no concern at the time the statute was enacted or in subsequent amendments with making funds available for the benefit of unborn children.

When the Social Security Act was discussed and debated prior to its enactment, what was to become the AFDC program was viewed as a counterpart to, and a federally funded extension to, state statues known as "mothers' aid" or "mothers' pension" laws. These laws were described as follows:

> "These are not primarily aids to mothers but defense measures for children. They are designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society."[22]

Another report stated the following about these laws and the proposed AFDC program:

> "Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. This is recognized by everyone to be the least expensive and altogether the most desirable method for meeting the needs of these families that has yet been devised."[23]

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[22] Message of the President Recommending Legislation on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Sess. 30 (1935).

[23] S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). *See also* H.R. Rep. No. 615, 74th Cong., 1st Sess. 10-12 (1935).

Finally, Title IV of the Act emphasizes that it was designed "for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives." Thus, it is apparent that an essential purpose of AFDC was to provide assistance to children who were fatherless or whose absent father failed to provide support so that the mother would be released from a wage-earning role and she would remain at home, supervising their upbringing and preventing them from falling into delinquency.[24] Indeed, so strong was that policy, that Congress in 1950 amended the Act so that the aid would include payments "to meet the needs of the relative with whom any dependent child is living."[25] It is equally apparent that this concern that the mother be in the home to raise the child only comes into play once the child is born. On the other hand, the principal purpose to be served by making payments for an unborn child would be the care of its mother during the pregnancy by providing nutrition, medication and health care, which no doubt would be beneficial to the unborn child. The Social Security Act at the time of its passage included a separate program which provides payments for maternal and pre-natal health care, but it does so in Title V,[26] not in Title IV which contains the AFDC provisions.[27] For

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[24]While the AFDC provisions have been amended several times during the intervening years, including in 1962, a change in the title of the program from its original "Aid to Dependent Children" to the present "Aid to Families with Dependent Children," *see* Pub. L. No. 87-543, 76 Stat. 172, 185 (1962), there is no evidence that the purpose of the program--promoting the home life of dependent children and their fostering by their mothers or other relatives--has changed. *See* 42 U.S.C. §601 (1970).

[25]42 U.S.C. §606(b)(1).

[26]42 U.S.C. §701 et seq. (1970).

[27]We do not bring attention to Title V with the idea that including unborn children in AFDC would necessarily be inconsistent with providing funds for maternal health care in Title V. To the contrary, as already noted, it would not only be

example, section 508(a) of Title V of the Act[28] authorizes federal grants to state agencies and private agencies in support of projects providing "necessary health care to prospective mothers (including, after child birth, health care to mothers and their infants) who have or are likely to have conditions associated with child bearing . . . ."

We conclude that the language and purpose of the AFDC provisions and the structure of the Social Security Act indicate that unborn children were not intended to be included in AFDC. We are also of the view that the omission of language in the statute and the absence of legislative history specifically excluding (or, for that matter, including) unborn children from coverage is because Congress never contemplated that they be eligible for AFDC benefits. It is manifest that had Congress intended to include unborn children within the definition of "dependent children," in all likelihood it would have expressed itself in clear and unambiguous language.[29]

Appellees place great reliance on a trilogy of Supreme Court cases striking down state legibility restrictions for AFDC benefits.[30] These cases may be summed up as holding that "at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and

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consistent with but it would further the general policy of the entire Act. The significance of Title V for our purposes is as evidence--rather strong evidence when combined with the language and purpose of the AFDC provisions--of a congressional intent *not* to include unborn children under AFDC but to provide for maternity care in a different section of the statute.

[28] 42 U.S.C. §708(a).

[29] *Cf. New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 414 (1973).

[30] *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968).

is therefore invalid under the Supremacy Clause."[32] Appellees contend that these cases require inclusion of unborn children in AFDC because fetuses are not specifically excluded from coverage. In a subsequent decision, however, the Court clarified the trilogy rule as applicable to those cases where "it was clear that state law excluded people from AFDC benefits who the Social Security Act expressly provided would be eligible."[32] The Act does not expressly provide that the unborn are eligible; moreover, we have rejected appellees' argument that the unborn come within the Act's definition of "dependent child." Hence the trilogy rule does not apply here.

We do, however, agree with both appellees and appellants that the Department of Health, Education and Welfare ("HEW") is incorrect in its policy of allowing payments to unborn children at the option of the participating states. If unborn children are eligible under the Social Security Act for AFDC payments, the trilogy cases clearly prevent the states from granting or withholding these payments at their options, since the Act itself does not provide such an option. If, on the other hand, unborn children are not eligible under the Act for AFDC benefits, HEW has no authority to approve such optional payments. The Act as to unborn children is either mandatory or it is not; either they are eligible or not eligible as "dependent children." Since we hold that unborn children are not eligible for AFDC, HEW exceeded its authority in granting states the option to make such payments under the Social Security Act.[33]

Appellees contend that we should nonetheless give great weight to the fact that HEW regulations permit AFDC payments to

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[32] *Townsend v. Swank*, 404 U.S. 282, 286 (1971).

[32] *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

[33] In this respect, we disagree with two other courts that have upheld state denials of AFDC benefits to the unborn. *See Poole v. Endsley*, 371 F. Supp. 1379, 1383 (N.D. Fla. 1974); *Parks v. Harden*, 354 F. Supp. 620, 625-26 (N.D. Ga. 1973).

unborn children[34]--although the optional aspect of these payments is invalid--since HEW is the federal agency charged with the program's administration. However, if HEW has incorrectly construed the Social Security Act to permit optional AFDC payments to unborn children, it may also have misconstrued it in ruling that such payments are permissible under the Act at all. While the construction of a statute by the agency charged with administering it is entitled to be given weight, "in the end, after whatever reserve, upon the courts rests the ultimate responsibility of declaring what a statute means."[35] We are convinced that our construction of the statute is correct, and decline to follow the HEW regulation to the extent that payments thereunder of AFDC benefits for unborn children are authorized by the Social Security Act.[36] Moreover, reliance upon the administrative regulation as reflecting Congressional purpose to include an unborn child within the definition of a "dependent child" is misplaced. HEW has expressly disavowed that under the Act an unborn child is within the definition of a needy "dependent child." Its position is that the regulation under which federal financial participation is made available, at the state's option, in payments on behalf of unborn children is an exercise of administrative discretion authorized by the Secretary's broad rule-making authority pursuant to section

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[34] 45 C.F.R. §§233.90(c)(2)(ii), 1c)(3) (1973).

[35] *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790 (2d Cir.), (L. Hand, J.), *aff'd*, 328 U.S. 275 (1946). *See also Volksuagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

[36] This conviction is strengthened by the analysis of the court in *Parks v. Hatden*, 354 F. Supp. 620, 625 n.5 (N.D. Ga. 1973), of the genesis of HEW's policy allowing AFDC payments to unborn children. According to that court, the policy stemmed from a decision by the Social Security Board to waive an audit exception to payments made to unborn children by the State of Wisconsin. Thus, it appears to have originated as an *ad hoc* decision to defer to a state's policy, rather than as a rule based on an interpretation of the federal statute.

1102 of the Act." Specifically with respect to that regulation, HEW is of the view "that Congress did not intend to include unborn children within the definition of 'dependent child' contained in section 406(a) of the Act."[38]

Finally, appellees rely on the fact that committees in both Houses of the 92nd Congress proposed an amendment to 42 U.S.C., section 606(a), that would have explicitly excluded the unborn from the term "dependent child."[39] The amendment was not enacted.[40] Appellees interpret this as congressional recognition of the HEW policy and acknowledgment of the correctness of HEW's construction of Section 606(a). Another court, however, has pointed out that "the reason the legislation was not passed was because the Congress decided to deal only with the Adult Categories of Public Assistance in [the law that was finally enacted, and] [t]herefore, all references to AFDC were set aside at that time."[41] Moreover, Congress' failure to enact the proposed amendment at that time--or to enact a similar amendment at any other time--may just as logically be interpreted as acquiescence in HEW's policy of making AFDC payments to the unborn optional, a policy which if upheld, would defeat appellees' statutory claim. "In any event, unsuccessful attempts at legislation are not the best guides to legislative intent"[42]--certainly not as to the intent of the 74th

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[37] 42 U.S.C. §1302.

[38] Supplemental brief submitted on behalf of HEW in *Adams v. Hueckel*, U.S.D.C., W.D. Ky., at 9 (May 2, 1974).

[39] *See* H.R. No. 92-231, 92nd Cong., 1st Sess. 181 (1971); S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 467 (1972).

[40] *See* Pub. L. No. 92-603, 86 Stat. 1329 (1972).

[41] *Mixon v. Keller*, 372 F. Supp. 51, 55 (M.D. Fla. 1974).

[42] *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 382 n.11 (1969).

Congress which passed the legislation here at issue.[43] We can discern no clear meaning from the 92nd Congress' failure to enact the proposed amendment, and for our purposes ascribe no significance to it.

In sum, with deference to the four courts of appeals who have held otherwise, we hold that Connecticut's denial of AFDC benefits to unborn children does not conflict with the Social Security Act.

II.

Since we reverse the district court's holding that Connecticut's policy conflicts with the Social Security Act, we next consider appellees' claim that this state policy of denying AFDC assistance to unborn children violates the Equal Protection Clause of the Fourteenth Amendment.

Appellees originally demanded that a three-judge district court be convened pursuant to 28 U.S.C., section 2281, but the district court's resolution of the pendent statutory claim[44] eliminated the need to consider convening a three-judge court to pass upon the equal protection issue.

Appellees' constitutional attack on the statewide policy of Connecticut's Welfare Department is within the scope of section 2281[45] and the issue is neither "wholly insubstantial" nor "obviously frivolous" so as to avoid under normal circumstances the need to convene a three-judge district court to decide the

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[43] *United States v. United Mine Workers of America*, 330 U.S. 258, 281-82 (1947).

[44] *See Hagans v. Lavine*, 415 U.S. 528 (1974).

[45] *Board of Regents v. New Left Education Project*, 404 U.S. 541, 544 n.2, 545 (1972); *Ortiz v. Colon*, 475 F.2d 1135 (1st Cir. 1973); *Rothblum v. Board of Trustees*, 474 F.2d 891, 894 (1st Cir. 1973). *See also Phillips v. United States*, 312 U.S. 246, 251 (1940).

Nevertheless, we decline to remand this case to the district court with instructions to convene a three-judge district court under 28 U.S.C. § 2281.

Because our conclusion that AFDC statutory provisions do not authorize payments to the unborn, there is no reason to remand the constitutional question for determination by a three-judge district court when the result is foreordained since that court, bound as it would be by our determination of the statutory issue, would have to deny the equal protection claim. It would be a waste of judicial manpower and of the litigants' time and resources to require that a three-judge district court go through the ritual of relying on our decision here to reject—as it would have to—appellees' constitutional argument. This conclusion strikes us as particularly appropriate and consistent with the historical purpose of section 2281, which was enacted for the protection of the states from the enforcement of state statutes by a single district judge, a purpose that would not be served by a remand in this case. True, this action [illegible] appellees of a direct appeal to the Supreme Court from a three-judge court,[7] but Supreme Court review of our decision is available through the device of certiorari, which appears likely, given the status of the litigation on this issue in the various circuits and the already pending petitions for certiorari. Moreover, the direct appeal provision appears "far more likely to have been for the [illegible] than for the plaintiffs."[8]

Turning to the merits of appellees' constitutional claim, we assume, without deciding, that appellees would be entitled to AFDC benefits in their own behalf rather than in behalf of their unborn children.[9] Essentially, the equal protection claim is based upon alleged discrimination in denying to them, as mothers of unborn children, the AFDC benefits and payments that are provided to all other children and their mothers. The Supreme Court has held that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Further, "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all . . . . It is enough that the State's action be rationally based and free from invidious discrimination."[10] Connecticut's policy of denying AFDC benefits to the unborn easily meets that test. Appellees do not allege that it is invidiously discriminatory in a "constitutional sense," and the classification is a rational means of advancing the purpose of the AFDC program: encouraging the presence of a relative in the home of a dependent child to supervise the child's upbringing.

The judgment of the district court is reversed.

ADDENDUM B

Constitutional Provisions

Article VI, second paragraph [Supremacy Clause]:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes and Regulations

Title 42 U.S.C. §606(a):

> The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

42 U.S.C. 602(b):

> (b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a

residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceeding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth. [Obsoleted, *Shapiro v. Thompson*, 394 U.S. 618]

42 U.S.C. 603(d):

(d) Notwithstanding any other provision of this Act, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any calendar quarter after June 30, 1968, shall not exceed the number which bears the same ratio to the total population of such State under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such State under the age of 18 on that date. [Repealed, P.L. 91-41 §3(a), July 9, 1969, 83 Stat. 45.]

45 C.F.R. §233.90 Factors specific to AFDC.

(a) *State plan requirement.* A state plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . .

***

(c) *Federal financial participation.*

(1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a

"dependent child", as defined in section 406(a) of the Act, is available within the following interpretations:

(i) *Needy child deprived by reason of.* The phrase "needy child * * * by reason of" requires that both need and deprivation of parental support or care exist in the individual case . . .

(ii) *Death of a parent.* If either parent of a child is deceased. . . .

(iii) *Continued absence of the parent from the home.* Continued absence of the parent from the home constitutes the reason for deprivationof parental support or care when the parent is out of the home. . . .

(iv) *Physical or mental incapacity.* "Physical or mental incapacity" of a parent may be deemed to exist . . .

(v) *Living with [a specified relative] in a place of residence maintained* * * * as his * * * own home. (a) a child may be considered to meet the requirement f living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

(1) Any blood relative, including . . .

***

(b) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuation of responsibility for day to day care of the child by the relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child. . . .

***

(2) *Federal financial participation is available in:* [Emphasis supplied]

***

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

***

ADDENDUM C

Certificate of Service

I, Lorna Lawhead Williams, Special Assistant Attorney General for the State of Iowa, hereby certify that on the 18th day of November, 1974, I mailed one (1) manuscript copy of BRIEF FOR PETITIONERS and that on the 25th day of November, 1974, three (3) printed copies of BRIEF FOR PETITIONERS were mailed, correct postage prepaid, to:

Mr. Robert Bartels
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I further certify that all parties required to be served have been served.

LORNA LAWHEAD WILLIAMS
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Des Moines, Iowa 50319

Attorney for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS,

Appellant,

vs.

LINDA ALCALA, individually and on behalf of all other persons similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

Motion for Leave to File Brief Amici Curiae and Brief as Amici Curiae in Support of Appellees of American Association for Maternal and Child Health, Childrens' Foundation, and Food Advocates

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS, *Appellant*,

vs.

LINDA ALCALA, individually and on behalf of all other persons similarly situated, *Appellees*.

On Appeal from the United States Court of Appeals for the Eighth Circuit

Motion for Leave to File Brief Amici Curiae in Support of Appellees on Behalf of American Association for Maternal and Child Health, Childrens' Foundation, and Food Advocates

This motion for leave to file the annexed brief *amici curiae* is respectfully made pursuant to Rule 42 of this Court.

Consent to the filing of this brief has been granted by counsel for Appellees Alcala *et al.* Counsel for Appellant Burns has stated that "Iowa has no objection to [Food

Advocates] filing an amicus brief."[1] Counsel for Appellant Burns has not formally replied to American Association for Maternal and Child Health and Children's Foundation's request for consent.

Taking the cautious course, all Amici join in this motion for leave of Court.

The AMERICAN ASSOCIATION FOR MATERNAL AND CHILD HEALTH (AAMCH) is a non-profit corporation organized under the laws of the state of Illinois. It was founded over fifty-six years ago, in Chicago, by medical professionals concerned with maternal and fetal health, including nutrition.

Today, the AAMCH is a nationwide organization with a membership representing a broad spectrum of health and nutrition disciplines—obstetricians, gynecologists, pediatricians, nurses, hospital administrators, dietitians, nutritionists, medical paraprofessionals, and educators. It has a membership of over 3,500 with divisions organized in six states—Illinois, Ohio, West Virginia, Pennsylvania, Maryland, California—and the District of Columbia.

The nutritional status and needs of pregnant mothers and their unborn children has long been a focus of the AAMCH and has encompassed the early introduction of obstretrical standards for hospitals and regular discussion of and papers on maternal and fetal nutrition as a part of the AAMCH annual congresses.

THE CHILDREN'S FOUNDATION is a privately funded, non-profit, nationwide organization which provides technical assistance and information on issues affecting the

1. Consent of counsel for Appellees Alcala *et al.* has been communicated to the Clerk of the Court via telegram. Iowa's letter to counsel for amicus Food Advocates has been filed with the Clerk of the Court.

problems of childhood. Through its national office in Washington, D.C. and its many field representatives throughout the nation, the FOUNDATION attempts to achieve maximum utilization of existing social programs to assure adequate child, infant, and fetal nutrition. The FOUNDATION actively opposes any government action which, through impairment of the adequacy of nutrition, threatens the development of children's full capabilities.

FOOD ADVOCATES is a federally-funded resource and advocacy project within the Department of Nutritional Sciences, College of Natural Resources, University of California, Berkeley. FOOD ADVOCATES is funded through the Emergency Food and Medical Services program of the U.S. Office of Economic Opportunity, and undertakes research and legal action pertaining to the levels of nutrition provided under government social programs and the rights of recipients under those programs. FOOD ADVOCATES provides support, evaluation, and information to community action and legal services programs, as well as to other groups concerned with the problems of hunger, malnutrition, and undernutrition in the Western states.

The AMERICAN ASSOCIATION FOR MATERNAL AND CHILD HEALTH, CHILDREN'S FOUNDATION, and FOOD ADVOCATES support both the social policy and legal analysis reflected in the decision of the Circuit court below. Amici further believe that decision to be consonant both with the controlling precedents of this Court and the intentions of the Congress in creating the Aid to Families with Dependent Children (AFDC) program.

Amici believe that the survey of medical and nutritional literature made in their brief is highly relevant and necessary for this Court to be fully informed. Because of the special expertise of Amici regarding the nutritional needs

of and risks to the mother and unborn child during pregnancy and because Amici doubt that these matters would otherwise be briefed, they request that this motion to file the annexed brief *amici curiae* be granted.

Respectfully submited,

ROBERT M. TEETS, JR.
GEORGE R. MOSCONE
Attorneys for
Amici Curiae

December 18, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS,

Appellant,

vs.

LINDA ALCALA, individually and on behalf of all other persons similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

Brief Amici Curiae in Support of Appellees Alcala, et al. of American Association for Maternal and Child Health, Childrens' Foundation, and Food Advocates

INTEREST OF THE AMICI

The interests of the Amici are set out in the preceding motion for leave to file this brief.

ARGUMENT

While Amici adopt and join in the legal argument of plaintiffs *Alcala et. al.* for affirmance, Amici additionally urge consideration of the highly relevant medical and nutritional evidence which follows.

Title IV of the Social Security Act of 1935 is widely recognized to have a dual focus—maintaining needy and dependent children and doing so within the context of a familial living unit.[1]

Amici argue that to exclude "unborn children" from the benefits of the Aid to Families with Dependent Children (AFDC) is to undermine both of these vital objectives. To fail to recognize an "unborn child" as a "dependent child" is to virtually program physiological and psychological hazard into the pregnancy and risk substantial infant morbidity as well as mortality. Congress can hardly be attributed to have elected to take so substantial a gamble with a portion of our future citizenry. Further, since restricted income leads to poor maternal nutrition as well as to poor fetal nutrition, exclusion of the "unborn child" from the AFDC grant risks the disability or even removal of the mother from the home and from other offspring. Such a risk then contravenes "the purpose of encouraging the care of dependent children in their own homes". Section 401 of Title IV of the Social Security Act of 1935 as amended, 42 U.S.C. section 601

I. Good Nutrition, Increased Food Consumption and Substantial Weight Gain Are Vital During Pregnancy.

Increased quantities of those nutrients essential to the maintenance of health in humans are required during pregnancy. The Food and Nutrition Board of the National Academy of Sciences—National Research Council regularly

1. e.g. Bell, W., *Aid to Dependent Children*, pp. 26-28 (Columbia Univ. Press, 1965).

publishes a list of *Recommended Daily Dietary Allowances* for nutrients including a table of the additional amounts of these nutrients required during pregnancy.[2]

In 1970 the Academy reiterated its recognition of the importance of nutrition during pregnancy in a report entitled *Maternal Nutrition and the Course of Pregnancy*[3]. The report summarizes existing significant research in this area and concludes:

> "Nutrition has an important role in reproductive performance. Epidemiological data strongly suggest that good preparation for pregnancy is based on a good health background and good nutritional status. To be well nourished from childhood and to maintain good diet during pregnancy would help to ensure safe, healthy pregnancies and healthy babies. To reach such an objective on a national scale has implications for policies that affect the availability of food, especially for families with inadequate food budgets;"[4]

The Academy's report has special implications for low-income pregnant women who because of the financial barriers posed by the spiraling rise[5] in the cost of food[6] have

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2. National Academy of Sciences, Food Research Board of the Nat'l Research Council, *Recommended Dietary Allowances*, 7th Edition (1968), 8th Edition (1974).

3. National Academy of Sciences, Committee on Maternal Nutrition of the Food and Nutrition Board of the National Research Council, *Maternal Nutrition and the Course of Pregnancy* (1970); *Summary Report* (1970).

4. Ibid, *Summary Report*, p. 15.

5. From January, 1973, through September, 1974, the retail cost of food for consumption at home rose 24.1%. *National Food Situation*, November, 1974, Table 15, page 37, USDA-Economic Research Service (NFS-150).

6. U.S. Senate, Select Committee on Nutrition & Human Needs, (Committee Print, June, 1974), *National Nutrition Policy Study Report & Recommendation VIII* pp. 15, 18-20:

> "[T]he disproportionately large share of food expenses in the budgets of poor people has caused the poor person's price index to advance faster than the regular consumer price

found it all but impossible to purchase an adequate food supply.

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index. The result is a disastrous decrease in the purchasing power of the poor. It also means that the poor have suffered far more grievously from the recent inflationary spiral than have the affluent and the middle class.

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"Several alternative results will occur due to this extraordinary inflationary price squeeze on the poor. *If a poor family pays for non-food necessities first,* then the family will either be unable to purchase the same (already meager) diet that it obtained previously, or it will have to experience a substantial negative asset movement (i.e., the sale of assets or increased debt) in order to obtain its previous food quotient. *If a poor family pays for food necessities first,* then the family will be unable to pay for such crucial necessities as utilities, medical expenses, clothing and/or other items; in the alternative, in order to subsidize these other necessities, the family will experience a significant negative asset movement. In sum, the current inflationary food spiral has been most destructive to poor people's already vulnerable economic and nutritional status.

* * *

"Finally, in addition to the general across-the-board price increases in food, the poor experienced especially severe food price increases. This occurred because of the following: Although the elasticity of food demand is relatively low in comparison with other budget items, there nevertheless is *some* elasticity with most food items. All consumers tend to alter the composition of their food purchases in response to price increases. People tend to reduce both the quantity and quality of food purchased as prices increase. Thus, each income class, in attempting to maintain its food budget within its income capabilities, will try to shift to lower-cost, lower-quality foods in order to compensate for increased food costs. For the poor, however, who already are consuming generally the lowest cost and lowest quality food items, there is virtually no flexibility to switch to lower cost food items. Thus, they are unable to cushion the food price increases by switching to cheaper food items (as the more affluent are doing). Moreover, as the more affluent families 'spend down' to cheaper food items, the demand for such cheaper items increases and such food items tend to become further price-inflated.

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"Evidence of this price increase differential is readily available. For example, poultry went up 144 percent (relative to its 1967 level) while beef went up only 75 percent; ham-

The risks associated with restriction and deprivation in total food intake were documented as early as the 1930's.[7] B. S. Burke related the nutritional quality of the diet of a group of pregnant women to the condition of their infants at birth and during the first two weeks of life. The maternal diets were rated as excellent, good, fair, or poor. A significant positive relationship was shown between the quality of the diet of the mother during the pregnancy and the group into which the infant was classified.[8] In addition, Burke reported a direct relationship between prenatal dietary rating and the course of pregnancy.[9] A positive relationship was also found between protein intake of the mother and the length, weight and general physical well-being of her infant. G. Toverud working in Oslo during the period 1939-1944 found that a group of pregnant women when given dietary supervision had a decrease in the incidence of maternal mortality and other complications, as well as stillbirth, prematurity, and neonatal deaths compared with the general population of the city.[10]

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burgers increased by 89 percent while sirloins increased by only 60 percent. Although the price of poultry rose faster than other meat products, poultry come to occupy a larger proportion of the protein input of the poor because it still was the cheapest source of meat protein. As a result, for many poor people the increases in prices were so high that they actually had to consume less of all products, particularly those vital to good health and productivity: protein products, dairy products, and some vegetables". (Emphasis in the original; footnotes omitted)

7. Garry, R. C., and D. Stiven, (1935-1936), "A Review of Recent Work on Dietary Requirements in Pregnancy and Lactation, with an Attempt to Assess Human Requirements", *Nutri. Abstr. Rev.*, 5:855.

8. Burke, B. S., V. A. Beal, S. B. Kirkwood, and H. C. Stuart, (1943), "The Influence of Nutrition upon the Condition of the Infant at Birth, *J. Nutr.* 26:569.

9. Burke, B. S., V. A. Beal, S. B. Kirkwood, and H. C. Stuart, (1943), "Nutrition Studies during Pregnancy", *Amer. J. Obstet. Gynecol.*, 46:38.

10. Toverud, G., (1950), "The Influence of Nutrition on the Course of Pregnancy", *G. Milbank Mem. Fund Quart*, 28:7.

A. INCREASED CALORIC AND PROTEIN INTAKE ARE NECESSARY

Specifically, an increase in caloric intake of approximately 10% over non-pregnant requirements is needed in normal pregnancy to permit the necessary adjustments in maternal physiology and provide for fetal development. This increase in calorie intake will allow for the recommended optimal total weight gain of 10 to 12 kg (22-27 lb). There is no justification for the routine restriction of weight gain to amounts less than the above because severe calorie restriction is potentially harmful to both mother and fetus. It impairs maternal ability to make the required physiologic adjustments of pregnancy, and appears to have an adverse effect on fetal growth and development during prenatal life and, perhaps, later as well.[11]

Studies have shown that there is an important interrelationship between calorie and protein intake. When calorie supply is sufficient to meet energy needs but protein intake is adequate, protein will be preferentially used to meet the body's basic energy requirements, creating a protein deficit. If inadequate amounts of protein are available for body-building functions, animal experiments have shown reduction in the number of offspring, the size of the young and their survival rate.[12] Subsequent growth of these animals is considerably inferior to that of animals with controlled, adequate diets.

In addition to these morphological sequelae of dietary restriction during pregnancy, other effects of perhaps greater

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11. Pitkin, Roy M., Harold A. Kamietsky, Michael Newton, and Jack A. Pritchard (1972), "Material Nutrition: A Selective Review of Clinical Topics", *Journal of Obstetrics and Gynecology*, 40:773.

12. Chow, B. F., and R. W. Sherwin, (1965), "Fetal Parasitism?", *Arch. Environ Health*, 10:395. See also—Chow, B. F. (1973), "Testimony on Maternal, Fetal, and Infant Nutrition", *Hearings Before The Select Committee on Nutrition and Human Needs, U.S. Senate* (Part 1—The Consequences Of Malnutrition), pp. 20-26.

significance have been described. Deficiencies in intellecutal functioning (as indicated by impaired maze-solving ability) and metabolic activities (reduced feed efficiency) of a permanent nature have been reported.[13] These observations can be explained by studies employing determinations of DNA as an index of cell number, and protein, and DNA ratio as an index of individual cell size. Since the development of organs and tissues involve sequential phases of division and growth, it is logical that restricting essential nutrients during cell division would have permanent effects.

Admittedly, the results of dietary restrictions on laboratory animals have not always yielded the same results when the same restrictions are placed upon human diets. For obvious ethical reasons, human experiments must be modified when run under controlled conditions. However, studies of the situation during World War II, when the diet of previously well-nourished women was affected by general food scarcity, to a large extent paralleled results of these tests on rats, and have given researchers increased confidence in the data generated from experiments using rats.

Finally, research in animals suggests that the effects of nutritional deprivation during pregnancy are perpetuated beyond the immediate following generation. Cowley & Griesel noted that when female rats were placed on a nutritionally inadequate diet during pregnancy and lactation and when their female offspring also were placed on an inadequate diet, even though the third generation offspring were placed on a normal diet during gestation, their offspring were found to be intellectually deficient.[14]

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13. Caldwell, D. F., and J. A. Churchill, (1967), "Learning Ability in the Progeny Of Rats Administered a Protein-Deficient Diet during the Second Half of Gestation", *Neurology*, 17:95.

14. Cowley, J. J., and R. D. Griesel, (1966), "The Effect on Growth and Behavior of Rehabilitating First and Second Generation Low Protein Rats", *Anim. Behav.* 14:506.

There is, then, a basis for a strong scientific inference that a similar effect occurs in humans when there is insufficent income to guarantee a nutritionally adequate diet.

B. INCREASED VITAMIN AND MINERAL INTAKE ARE NECESSARY

Animal experiments have indicated that various vitamin deficiencies have an adverse effect upon the outcome of pregnancy. While vitamin deficiency is rare among upper-middle class Americans, studies have shown that selected deficiencies do exist in poorer Americans whether they live in urban or rural areas.[15]

Although vitamin and mineral supplementation has been routinely prescribed by physicians, the National Academy of Sciences considers such supplementation to be of doubtful value, and further states that "vitamin and mineral preparations should not be regarded as correctives for improper food habits. Their costs, relative to the cost of enhancing the nutrient intake with foods, should be taken into account, especially in dealing with women who are living on low incomes."[16]

Iron is the exception to this prohibition. Recognizing that most women do not have sufficient iron stores to meet the needs of pregnancy and that an adequate supply of iron from the diet cannot be easily obtained, the Academy recommends supplementation during the second and third trimesters of pregnancy.[17]

Although doctors believe that a history of good nutrition is desirable, a study by Ebbs has shown that improving the

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15. Jeans, P. C., M. B. Smith, and G. Stearns, (1952), "Dietary Habits of Pregnant Women of Low Income in a Rural State", *J. Amer. Diet. Assn.* 28:27. See also DHEW, *Ten-State Nutrition Survey*, 1968-1970, (HSM-72-8130-8134).

16. "*Maternal Nutrition and the Course of Pregnancy*, *op cit* note 3, at 103.

17. *Ibid.*

diet during pregnancy may be sufficient to deliver a healthy infant. Pregnant women were divided into three groups. The first group had a history of poor diets but was supplemented during the last 4 months of pregnancy. Those in the second group had a moderately good diet while those in a third group had poor diets and served as controls. During the course of pregnancy the first and second groups enjoyed better health and their offspring were healthier than those of the third group. No differences were detected between the women with a history of good diet and those with a history of poor diet who received supplementation during pregnancy.[18]

II. The Adverse Effects for the Infant of Poor Maternal Nutrition.

Research has determined four general adverse effects on the infant of poor maternal nutrition: low birth weight, stillbirths, premature births, and anemia.

A. THE RISK OF LOW-BIRTH WEIGHT

Probably the most severe effect of poor maternal nutrition is a decrease in the infant's weight at birth, since low birth weight brings with it increased chances of neonatal fatalities and may also result in irreversable brain damage. The incidence of low-birth-weight infants has been linked to socioeconomic status, low material weight gain, poor nutrition and lack of proper medical attention during pregnancy.[19]

The relationship between poor nutrition and low birth weight was demonstrated during World War II. General

18. Ebbs, J. H., F. F. Tisdall, and W. A. Scott, (1942), "The Influence of Prenatal Diet on the Mother and Child", *G. Milbank Mem. Fund Quart*, 20:35.

19. "*Maternal Nutrition & The Course of Pregnancy-Summary Report, op cit* note 3, at 14.

nutrition was poor in countries that had previously enjoyed an adequate food supply and researchers found that birth weight decreased. In Holland, Smith found a decrease of about 10% in average birth weights during 1944.[20] In Leningrad, Antonov also found a marked increase in the incidence of low birth weight infants and a 31% increase in mortality during the neonatal period.[21]

Ebbs has demonstrated that both the increased possibility of neonatal fatalities and the effects of low birth weight may be impossible to reverse. In a review at six months of age of infants whose diets had been controlled, he found that weights of infants born of mothers who had received supplemented diets during pregnancy were higher than weights of infants born of mothers who had an unsupplemented poor diet during pregnancy.[22]

Low birth weight and perinatal death are much more common in families of low socioeconomic status than in families that are better off. We now identify under-nutrition as the cause of low birth weight in a group of infants born of poor urban mothers.[23]

B. THE RISKS OF MENTAL RETARDATION AND PSYCHOLOGICAL IMPAIRMENT

Perhaps the most disturbing results of tests run on low birth weight infants are those which link low birth weight with subsequent retardation. Birch, surveying the research to date, asserts that low-birth weight children are consid-

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20. Smith, C. A. (1947) "Effects of Maternal Undernutrition upon the Newborn Infant in Holland (1940-1945)." *J. Pediat.* 30:229.

21. Antonov, A. N. (1947) "Children Born during the Seige of Leningrad in 1942". *J. Pediat.* 30:250.

22. Ebbs, J. H. *et al., op cit.*, note 18.

23. Naeye, R. L., M. M. Diener, W. S. Dellinger, (1969) "Urban Poverty: Effects on Prenatal Nutrition", *Science* 166:1026.

erably over-represented among the mentally subnormal.[24] Defects have been found in the number and size of brain cells and the extent of brain mylenation.[25] Development of enzyme systems associated with brain lipid formation has been shown to depend upon adequate uterine growth. Moreover, when development of the nervous system is impaired at a critical time in utero, full recovery is not possible by later nutritional intervention no matter how zealously attempted. Among very low birth weight infants, there is an increased incidence of epilepsy, cerebral palsy, and severe mental retardation. Retrospective data on several groups of low birth weight children have shown generally lower scores on standard mental and psychological tests. Moreover test scores show a progressive decrease with decreasing birth weights, with low-birth weight children tending to achieve lower scores both in the pre-school years and at school age.

The neurological deficits which are a result of low birth weight would, when one applied generally accepted psychiatric theories, be associated with perception, perceptual-motor integration, abstract reasoning and short attention span impairments. This hypothesis when tested revealed a correlation between low birth weight and impairment on five of the six measures of IQ. Moreover, abstract verbal reasoning and perceptual-motor integration impairments were most marked in low birth weight children. In addition, low birth weight children have also been found by virtually

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24. Birch, H. G., (1971), "Functional Effects of Fetal Malnutrition", *Hospital Practice*, 134:147; see also Butler, N. (1974), "Late Postnatal Consequences of Fetal Malnutrition", *Nutrition & Fetal Development*, (M. Winick, editor), p. 173.

25. Winick, Myron, (June 1971) "Cellular Growth During Early Malnutrition", *Pediatrics* 47:969.

all investigators to suffer more personality disturbances than do children of normal birth weights.[26]

C. THE RISK OF STILLBIRTH

Studies have demonstrated a strong correlation between stillbirths and poor maternal nutrition.[27] Cameron and Graham demonstrated that mothers with full-term infants had better diets than did mothers of stillborn infants.[28] Antonov, using the data on children born during the Siege of Leningrad, found a doubling of the stillbirth rate.[29]

Similarly, for a decade preceding 1939 the fetal mortality rate and the stillbirth rate in the United Kingdom were relatively stationary. However, a rapid decline occurred between 1940 and 1945 when food was scarce. Because of this food shortage the government initiated a food rationing program which gave priority to pregnant women. The result of the program was that lower class women were actually receiving a better diet than they would have received before the war and this accounts for the decrease in the stillbirth rate. These findings were confirmed by

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26. See generally Scrimshaw, N. S., and J. E. Gordon (editors), *Malnutrition, learning, and behavior,* (M.I.T. Press, 1968). See also Cravioto, J. L. Hambraeus, and B. Vahlquist (editors), *Early Malnutrition and Mental Development,* (Swedish Nutrition Foundation, 1974).

27. Autopsies performed on American 469 infants lead researchers to conclude, "to be born poor proved a blight. The underprivileged group weighed 12% to 16% less than their correlatives. And practically every vital organ was underweight. Heart, liver, kidneys, thymus, adrenals, and spleen, all were stunted." Further, histological studies revealed reduced cytoplasm in the cells of poor infants, reduced subcutaneous fat in the abdominal wall; and inferior skeletal muscle development. Naeye, R. L. and W. A. Blanc, (March 1970) "Fetal Famine May Kill More than We Think", *Medical World News* 11:15.

28. Cameron, C. S. and S. Graham, (1944) "Antenatal Diet & Its Influence on Stillbirths & Prematurity", *Glasgow Med. J.* 24:1.

29. Antonov, A. N. *op cit.* note 21.

Balfour[30] in a study of nearly 20,000 pregnancies, which found a significant reduction in the stillbirth rate, as well as in the neonatal mortality rate, among women whose diets were adequately supplemented.

D. THE RISKS OF INFANT MORTALITY

Premature birth is a principle cause of infant mortality. The National Research Council in 1950, surveyed the research and found:

> "Investigations have confirmed that prematurity is attributable to a combination of various factors including those of nutritional, mental, or social character, which influence the general well-being of the mother. By studying the growth of the fetus and investigating the full nutritive requirement of the mother and fetus, the problem of prematurity will be solved and fetal and neonatal infant mortality and morbidity will be lowered. The constant improvement in the care of these infants is a contribution to pediatric knowledge, but it is the prevention of their premature delivery which must be the ultimate objective. If a positive result is to be gained in reduction of premature births, attention must be paid to the environmental stresses, as well as to the nutritional status of pregnant women. Social and financial security are of the greatest importance in this connection. The better the care of pregnant women, the lower the stillbirth, premature birth, and neonatal mortality rates, and the better the general health of newborn infants."[31]

E. THE RISKS OF ANEMIA

Postnatal anemia is suspected to be related to fetal nourishment during gestation. The iron content of the infant

30. Balfour, M. J. (1944), "Supplementary Feeding in Pregnancy", *Lancet* 1:208.

31. National Academy of Sciences, Food & Research Board of the National Research Council, (1951), *Maternal Nutrition & Child Health*, Bulletin 123, pp. 130-131.

at birth depends upon the maternal iron intake during pregnancy. If iron intake was inadequate, the infant will have insufficient iron reserves in his body.[32]

Because milk and other infant foods are generally poor dietary sources of iron, the infant is dependent upon its iron reserves until such time as its diet can be expanded to include iron rich foods. Cautley maintains that this lack of iron in the fetal tissues is the essential cause of anemia during infancy.[33]

III. The Adverse Effects of Poor Nutrition for the Pregnant Mother.

Thus the results of extensive research demonstrates the importance of an adequate diet for the mother during pregnancy to increase the probability of a healthy infant. But other studies show that good nutrition during pregnancy also is important in lessening the burden on the mother's body, improving her health during pregnancy, and decreasing the incidence of maternal mortality and morbidity.

A. THE RISK OF MATERNAL MORTALITY

The Ebbs study[34] compared three groups of pregnant women: those with a history of poor diet who during the last four months altered their diets to the recommended standard; those with a history of moderately good diet, and those with a history of poor diets. During the entire course of pregnancy, the mothers in the first two groups enjoyed better health, had fewer complications and were better obstetrical risks than those left on the poor diet.

32. Maternal Nutrition and Child Health, op cit, note 31, at 92.

33. Cautley, E., (1940), "Simple Infantile Anemia," *Clin. J.* (London) 36:325.

34. Ebbs, J. H., F. F. Tisdall, and W. A. Scott, (1941), "The Influence of Prenatal Diet On Mother And Child," *J. Nutr.*, 22:515.

The most serious effect of poor nutrition upon the mother is the tendency that it has to increase the mortality rates of women during childbirth. Although it is difficult to isolate poor nutrition from inadequate hygiene and medical care, which are generally linked, the National Research Council has urged that a greater emphasis be put on nutrition during pregnancy to further decrease maternal mortality. While the number of women dying in childbirth in the U.S. has been reduced to under a thousand (1967), studies by maternal mortality committees indicate that at least half of these deaths are preventable.[35]

Toxemia is the most frequent cause of maternal deaths in the United States. Incidence of toxemia appears to be related to income level and other environmental factors rather than to genetic factors. Counting the District of Columbia as a state and dividing the states into three groups according to per capita income, mortality rates for toxemias of pregnancy were as follows:

MORTALITY RATE BY INCOME GROUP[36]

Income Group	Mortality Group (%)
High	3.8
Middle	5.9
Low	11.9

The rate for middle income group is close to the national average of 6.2%. This data suggests a strong correlation between toxemias of pregnancy and income.

Around the turn of the century it was believed that a restricted diet reduced the chances of toxemia. This idea has since been rejected in favor of an emphasis on an increase in protein in the diet as being the most important

35. *Maternal Nutrition and The Course Of Pregnancy, op cit* note 3, at 184.

36. *Ibid*, at p. 165.

factor in decreasing the incidence of toxemia.[37] Statistics supporting this more recent practice show that where undernutrition still exists, toxemia remains a danger to pregnant women.

B. THE RISK OF MATERNAL MORBIDITY

The long-term effects of pregnancy complications on women who survive childbirth include varicose veins, chronic problems of the genito-urinary tract (particularly the lower tract), and pelvic floor relaxations. These complications if existing prior to pregnancy are aggravated. Further, short-interval pregnancies are known to deplete a malnourished mother of calcium and iron stores and may contribute to the development of iron deficiency anemia. Anemias and other consequences of undernutrition combine with infections and chronic illness to increase maternal morbidity and mortality.[38]

An increased incidence of diabetes following pregnancy is also thought to result from poor maternal nutrition during pregnancy.[39]

These complications are more frequent in low-income mothers than in women of other income groups.[40]

IV. Inadequate Income Contributes to Poor Food Habits and Inadequate Nutrition.

Studies of the nutrition of indigent women in urban areas[41] and of rural pregnant women of low-income have

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37. *Maternal Nutrition And The Course of Pregnancy, op cit* note 3, at p. 176.

38. *Ibid* at 7.

39. Hoet, J. P., (1954), "Carbohydrate Metabolism during Pregnancy", *Diabetes*, 3:1; Pyke, D. A., "Diabetes Mellitus in Pregnancy", *Practitioner*, 194:766.

40. "Principle Causes of Maternal Mortality, 1957-1962" (1964), *Calif. Med.*, 100:412.

41. Darby, W. J., *et al.*, (1953), "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition I, II, and III", *J. Nutr.*, 51:539.

shown that their diets are inadequate.[42] Additionally, most low-income women have a history of poor dietary habits, dating back to childhood, often resulting from the family's inability to purchase a wide variety of foods.

Although USDA studies have shown that low-income households spend their food dollars more efficiently (i.e. more nutrition is purchased per dollar) than any other income group,[43] their studies have also shown that the less money a family has to spend on food, the more likely that the diet will be deficient in one or more nutrients, even when reasonable selections are being made from each of the "Basic Four"[44] food groups.[45]

The food purchasing power of the limited economic resources of the poor is further diluted by the artificially inflated food pricing practices endemic in low-income areas. Several governmental studies in the late 1960's confirmed that the private sector's food distribution system "performs less satisfactorily in the low-income areas of our major cities than in suburban areas."[46]

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42. Jeans, P. C., *op cit.*, note 15.

43. USDA, Agriculture Research Service, (1970), "Dietary Levels of Households in the U.S.", *Household Food Consumption Survey 1965-66*, Report No. 6, at 6.

44. The "Basic Four" is a simplified concept of good nutrition which divides all food into one of four groups: dairy products, bread and cereal products, fruits and vegetables, and protein foods.

45. Peterkin, B. and F. Clark, (1969), "Money Value and Adequacy of Diets Compared with USDA Food Plans", *Family Economics Review* (ARS G2-5), September, 1969, pp. 6-8.

46. U.S. House of Representatives, Committee on Government Operations (Committee Print, July, 1969), "Economic Report On Food Chain Selling Practices In The District Of Columbia And San Francisco, A Staff Report to the Federal Trade Commission", p. 3. See also: House Report No. 1851 (90th Cong., 2nd Sess.), "Consumer Problems of the Poor: Supermarket Operations in Low-Income Areas and the Federal Response"; Dept. of Labor, Bureau of Labor Statistics, (February, 1969), "Retail Food Prices in Low and High Income Areas"; Dept. of Agriculture, Economic Research Service, "Food Prices—Before and After Distribution of Welfare Checks . . . Low Income Areas, Seven Cities, 1969" (M.R.R. No. 907-1).

While studies show that improved diet during pregnancy can compensate for the mother's prior undernutrition and malnutrition, and can substantially increase the infant's birth weight,[47] because of low AFDC grant levels[48] and the

47. Habicht, J. P., C. Yarbrough, A. Lechtig, and R. E. Klein, (1974), "Relation of Maternal Supplementary Feeding During Pregnancy to Birth Weight and Other Sociobiological Factors", *Nutrition And Fetal Development* (M. Winick, editor), p. 127. See also Higgins, A. C., E. W. Crampton, and J. E. Moxley (1972), "Nutrition and the Outcome of Pregnancy", Address to the IVth International Congress of Endocrinology, Symposium on Protein Malnutrition and Endocrine Systems (Washington, D.C., June, 1972); Primrose, T. and A. Higgins (1971), "A Study in Human Antepartum Nutrition", *J. Reproduct. Med.* 7:257.

48. The present low AFDC grant levels across the nation virtually guarantee that pregnant AFDC mothers will be unable to secure adequate nutrition for themselves and their unborn children. This may be readily demonstrated by a comparison between USDA's low cost food plan and DHEW's AFDC grant level data. USDA's "basic low cost food plan is the plan most often used by social welfare and public health agencies for calculating allotments and planning family food budgets." USDA, Agriculture Research Service No. CA-62-19, "Family Food Plans Revised 1964", p. 2.

In June, 1974, the cost of USDA's low cost food plan for a household of a pregnant mother, a boy (9-12 years), and a girl (9-12 years) was $149.10 per month.

Yet DHEW data for April, 1974, finds nineteen states with average family AFDC grants less than the monthly cost of USDA's low cost food plan. DHEW Publication No. (SRS) 75-03100, NCSS Report A-2, "Public Assistance Characteristics", Table 4. Those nineteen states are—Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, New Mexico, North Carolina, South Carolina, Tennessee, Texas, and West Virginia. See also, Institute for Research on Poverty, University of Wisconsin, (1974), "Toward an Effective Income Support System: Problems prospects, and choices", pp. 97-100. Thus it is not surprising that DHEW has found increased evidence of widespread malnutrition and substantiated the clear link between malnutrition, poverty, and social and cultural disadvantage. Their study results further reveal a particularly low protein intake among low-income pregnant women and an associated incidence of low birth weights among their offspring. *The Ten-State Nutrition Survey, 1968-1970.* U.S. Department of Health, Education & Welfare, publication Nos. (HSM) 72-8130-8134.

especially severe effects of inflation on the food purchasing power of AFDC households, AFDC mothers face nearly insurmountable barriers to the meeting of their nutritional needs during pregnancy. Thus to reduce the morbidity and mortality risks to both the low-income mother and her unborn child, prenatal diets must include sufficient nutrients to provide for past nutritional deficiencies as well as the current needs of the pregnancy.

V. The Economic and Social Risk if Unborn Children Are Denied Aid to Families with Dependent Children Entitlements.

The Subcommittee on Nutrition and Human Needs of the California State Senate, in hearings to investigate the effects of grant cuts to AFDC mothers, heard testimony about the immediate postnatal costs of caring for infants born to low-income, poorly nourished mothers. Dr. William Silverman, a well-known neonatologist, testified that such babies:

> "must remain in the hospital for long periods of time, for management of his problems of being born prematurely, or being underweight . . . the acute costs are tremendous . . . but if it is the overall lifetime cost when we are talking about retardation, I have no idea exactly . . . it's many, many times that of the normal healthy, bouncing, middle-class child."[49]

Dr. Silverman's estimate of the cost of immediate postnatal care for such children was "$150 to $200 per day, times two weeks, three weeks, four weeks, you get some rough estimate of what we are doing".[50] Later Dr. Walter

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49. "Hearings: AFDC Grant Cuts to Pregnant Women, October 4, 10, 26 and November 29, 1972", Subcommittee on Nutrition and Human Needs, California State Senate, Health & Welfare Committee at page 35.

50. Ibid, at page 35 and see also Silverman, W. A. & J. C. Sinclair, (1966) "Current Concepts: Infants of Low Birth Weight", *New England Journal of Medicine*, 274:448.

M. Ballard, Chief of the Maternal Health and Family Planning Unit in the Bureau of Maternal and Child Health of the California State Department of Public Health and a specialist in obstetrics and gynecology, testified with respect to Dr. Silverman's estimate that:

> "If anything, it seems to me to be an understatement of that problem. I was in private practice up to about five years ago, before I came into the public health field, and some of my patients who had premature babies had a fantastic hospital bill, because their babies were in the hospital upwards of a month or two months depending upon prematurity, how severely underweight they were at birth and how well they managed to take nourishment, etc."[51]

Dr. Silverman and Ballard thus estimate the immediate cost of caring for newborns suffering the debilitating effects of poor prenatal nutrition to be $2200 to $5600 and more in hospital expenses alone.

The cost of caring for children of poorly nourished mothers does not consider the additional expense of maternal complications, the incidence of which, as noted previously, bears a direct relationship to income and nutrition during pregnancy. Nor do these costs consider the additional costs which arise from the fact that children born of high-risk pregnancies throughout their childhoods have increased susceptibility to infections, illness and disability.

Finally, and perhaps most expensive are the increased costs of education for children who, because of complications during pregnancy, suffer either mild or severe forms of mental retardation. The economic costs are twofold: increased costs of special education, and the likelihood of the child's increased dependence upon society for assist-

51. Ibid, at page 76.

ance in adulthood because of the increased likelihood of poverty.[52]

> "[I]n terms of over-all cost it would certainly be more efficient to use the available funds to . . . prevent the exceedingly costly consequences of maintaining within the society large numbers of individuals who are unable to contribute because of marginal mental development."[53]

VI. Conclusion.

For the reasons stated above, the judgment of the Court of Appeals for the Eighth Circuit, should be affirmed.

Respectfully submitted,

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December 18, 1974

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AUDREY TITTLE CROSS

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52. See generally The California State Assembly Committee on Health and Welfare, *Malnutrition: One Key to the Poverty Cycle,* January 12, 1970.

As the Report concludes, however, the ultimate cost may never be measurable in purely economic terms.

"*[E]ven the most sophisticated and expensive compensatory education cannot restore a poor child's ability to compete intellectually on equally terms if that child's potential for intellectual development has been irreversibly impaired by malnutrition.*" Emphasis in original, page 3.

53. Winick, Myron, (May 1969) "Malnutrition and Brain Development" *Journal of Pediatrics,* 74: 678.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS, COMMISSIONER OF IOWA STATE DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS

v.

LINDA ALCALA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (Br. in Opp. App. A) is reported at 362 F. Supp. 180. The opinion of the court of appeals (Pet. App. A) is reported at 494 F. 2d 743.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1974. The petition for a writ of cer-

tiorari was filed on May 15, 1974, and granted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a fetus is a "child" within the meaning of Section 406(a) of the Social Security Act.

STATUTE AND REGULATORY PROVISIONS INVOLVED

Section 406(a) of the Social Security Act of 1935, 49 Stat. 629, as amended, 42 U.S.C. 606(a), in pertinent part provides:

> The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and * * * a student regularly attending a school * * *.

45 C.F.R. 233.90(c)(2), relating to federal payments to states in support of their participation in the program of aid to families with dependent children, in pertinent part provides:

(2) Federal financial participation is available in:

* * * * *

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis; * * *.

INTEREST OF THE UNITED STATES

Pursuant to Sections 401 through 410 of the Social Security Act of 1935, as amended, 42 U.S.C. 601 through 610, the United States provides for a public assistance program of aid to families with dependent children ("AFDC"). This program is jointly financed by the states and the federal government and is administered on the local level by the individual states. A state need not participate in this program. If a state chooses to participate, it must submit a plan of administration to the Secretary of Health, Education, and Welfare. The Secretary approves the plan, and the state's participation in the program, if the plan satisfies the requirements of Section 402(a) of the Act, including the requirement (in Section 402(a)(10)) that the plan provide "that aid to families with dependent children shall be furnished * * * to all eligible individuals." The federal government then provides certain matching funds to the state.

The Iowa AFDC plan does not provide for payments of aid with respect to fetuses. The Secretary has approved the Iowa plan as consistent with Section 402(a)(10), under the theory that a fetus is

not a "child" within the meaning of Section 406(a) of the Act.

In this suit, respondents challenge Iowa's compliance with Section 402(a)(10). This challenge calls into question the correctness of the Secretary's interpretation of the Act. The outcome of this case may affect the operations of AFDC plans in more than thirty states that now deny benefits with respect to fetuses, and it will necessarily affect the future administration of federal assistance under the Act.

STATEMENT

Respondents, at the time they brought this action, were childless pregnant women who had been denied aid to families with dependent children under the State's AFDC plan. They contended that the denial of benefits to needy pregnant women violated Section 402(a)(10) of the Social Security Act of 1935, 42 U.S.C. 602(a)(10), which requires that state AFDC plans furnish assistance to "all eligible individuals." Respondents' claim to be "eligible individuals" rested upon the premise that where eligibility requirements are otherwise met, a fetus is a "dependent child" within the meaning of Section 406(a) of the Act.[1] The district court upheld their claim and granted declaratory and injunctive relief (Br. in Opp. App. A). The court of appeals affirmed (Pet. App. A).

---

[1] We use the word "fetus" here to refer generally to the embryonic or fetal child from the time of medical verification of pregnancy.

SUMMARY OF ARGUMENT

The question presented here is whether a fetus is a "child" within the meaning of Section 406(a) of the Social Security Act. If a fetus is a "child" within the meaning of that statute, payments of aid to families with dependent children must be made on behalf of a fetus, and to the pregnant woman as the adult relative living with and caring for the "child," when the woman otherwise satisfies AFDC eligibility requirements.

The stated purpose of the AFDC title, its various provisions, and the legislative history, all reveal congressional concern only for living dependent children and their families. Section 401 of the Act states that the purpose of the AFDC program is to "encourag[e] the care of dependent children in their own homes or in the homes of relatives * * *." No provision of the AFDC title expressly applies to fetuses or unborn children, whereas many have application only to living children. The legislative history shows a predominant concern with "keep[ing] the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions." S. Rep. No. 628, 74th Cong., 1st Sess. 17.

Accordingly, we believe that Congress intended the word "child" to be given its commonly accepted meaning, *i.e.*, a living child, not a fetus. The Secretary's regulations permitting payments on behalf of fetuses are not to the contrary; they rest upon the assumption that the Secretary may authorize payments on behalf of persons other than "dependent children" in certain limited circumstances.

ARGUMENT

A FETUS IS NOT A "CHILD" WITHIN THE MEANING OF SECTION 406(a) OF THE SOCIAL SECURITY ACT

The narrow question of statutory interpretation presented by this case is whether a fetus is a "child" within the meaning of Section 406(a) of the Social Security Act. There is no issue here concerning the scope of the State's obligation under Section 402(a)(10) of the Act to furnish assistance to "all eligible individuals"; prior cases interpreting the latter provision make clear that if, as the courts below held, a fetus is a "child" under the Act, the State must provide assistance to pregnant women who otherwise satisfy AFDC eligibility requirements. See *Carleson* v. *Remillard*, 406 U.S. 598; *Townsend* v. *Swank*, 404 U.S. 282; *King* v. *Smith*, 392 U.S. 309.

1. Although Section 406(a) defines the phrase "dependent child," that definition does not speak directly to the question of statutory interpretation presented here. "Dependent child" is there defined as "a needy child (1) who has been deprived of parental support or care by reason of death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother * * * in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under

the age of eighteen * * *." [2] Although this language indicates that the focus of congressional concern was on living children, nothing in that language absolutely prohibits treating a fetus as a "child."

Other provisions of the statute, considered in isolation, are similarly ambiguous and inconclusive on this question. But read together, they strongly suggest that Congress, in enacting the AFDC program, was concerned only with the plight of living dependent children and not with the needs of fetuses and expectant mothers. Perhaps the clearest indication of this is in Section 401, which states that the purpose of the AFDC program is to "encourag[e] the care of dependent children in their own homes or in the homes of relatives * * *." That purpose, of course, applies only to living children, not to fetuses.

Other provisions of the statute also have application only to living children. See, *e.g.*, Section 402(a)(7) and (8) (relating to the extent that the child's income and resources are to be taken into consideration in determining his need); Section 402(a)(13), (14) and (15) (relating to the provision of social services to the child "in order to assist such child * * * to attain or retain capability for self-support"); Section 402(a)(16) (relating to protection against the child's "neglect, abuse, or exploitation"); Section 402(a)(17) (relating to children "born out of wedlock" or "deserted or abandoned by [their] parent[s]").

---

[2] Sections 407 and 408 of the Act expand the definition to cover needy children in foster homes or whose parents are unemployed.

The legislative history also supports the view that Congress, in enacting the AFDC program, did not have in mind the needs of childless pregnant women. That history and the inferences properly to be drawn therefrom have been well summarized by the Second Circuit as follows (*Wisdom* v. *Norton*, No. 74-1402, decided October 11, 1974, slip op., pp. 5682-5684; footnotes omitted):

> * * * Congress manifested no concern at the time the statute was enacted or in subsequent amendments with making funds available for the benefit of unborn children.
>
> When the Social Security Act was discussed and debated prior to its enactment, what was to become the AFDC program was viewed as a counterpart to, and a federally funded extension of, state statutes known as "mothers' aid" or "mothers' pension" laws. These laws were described as follows:
>
> > "These are not primarily aids to mothers but defense measures for children. They are designed to release from the wage-earning role the person whose natural function is to give her children the physical and affectionate guardianship necessary, not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society." [Message of the President Recommending Legislation on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess. 30.]

Another report stated the following about these laws and the proposed AFDC program:

> "Through cash grants adjusted to the needs of the family it is possible to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions. * * *" [S. Rep. No. 628, 74th Cong., 1st Sess. 17. See also H. Rep. No. 615, 74th Cong., 1st Sess. 10-12.]

Finally, Title IV of the Act [relating to the AFDC program] emphasizes that it was designed "for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives." Thus, it is apparent that an essential purpose of AFDC was to provide assistance to children who were fatherless or whose absent father failed to provide support so that the mother would be released from a wage-earning role and she would remain at home, supervising their upbringing and preventing them from falling into delinquency. * * * It is equally apparent that this concern that the mother be in the home to raise the child only comes into play once the child is born. On the other hand, the principal purpose to be served by making payments for an unborn child would be the care of its mother during the pregnancy by providing nutrition, medication and health care, which no doubt would be beneficial to the unborn child. The Social Security Act at the time of its passage included a separate program which provides payments for maternal and prenatal health care, but it does so in Title V, not in Title IV which contains the AFDC provisions.

As the court of appeals in *Wisdom* v. *Norton* further pointed out (slip op., p. 5684, n. 27), the fact that Congress enacted a maternal and pre-natal health care program under a separate title of the Social Security Act, without making any mention of aid to needy pregnant women in the AFDC title, is "evidence—rather strong evidence when combined with the language and purpose of the AFDC provisions—of a congressional intent *not* to include unborn children under AFDC but to provide for maternity care in a different section of the statute."

Additional evidence of congressional intent is provided by the fact that the Social Security Act, as originally enacted, authorized AFDC payments only with respect to the needs of a dependent child. See 49 Stat. 629. Had Congress intended to include needy pregnant women within the AFDC program, presumably it would have permitted recognition of the needs of such women, since the needs of a fetus are not capable of independent determination. Moreover, when Congress in 1950 extended AFDC coverage to adult relatives living with and caring for the "dependent child" (see 64 Stat. 551), it did so in a manner that leaves little doubt that childless pregnant women were not the intended beneficiaries:

> In the present law, aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly in families with small children, it is necessary for the mother

> or another adult to be in the home full time to provide proper care and supervision. Since the person caring for the child must have food, clothing, and other essentials, amounts alloted to the children must be used in part for this purpose if no other provision is made to meet her needs. [H. Rep. No. 1300, 81st Cong., 1st Sess. 45-46.]

In short, additional provision was made for adult relatives living with and caring for the child, because a failure to do so would, as a practical matter, result in a reduction in the amounts actually available for the care of the child. That consideration obviously has no application to childless pregnant women.

This history shows that Congress, in enacting and subsequently amending the Social Security Act, intended the word "child" in the AFDC title to be given its commonly accepted meaning, *i.e.*, a living child, not a fetus.[3] Cf. *Malat* v. *Riddell*, 383 U.S. 569. As the court in *Wisdom* v. *Norton*, *supra*, observed (slip op., p. 5681):

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[3] Some dictionaries include "fetus" within the meaning of "child," but many do not. Compare, *e.g.*, the American Heritage Dictionary of the English Language (1969) and the Shorter Oxford English Dictionary (1933) with Funk & Wagnalls Standard Dictionary, International Edition (1958) and the Random House Dictionary of the English Language (Unabridged) (1966). See generally *Wisdom* v. *Norton*, *supra*, slip op. at p. 5681 and nn. 17 and 18. But when "child" does embrace "fetus" within its meaning, it is chiefly in specific phrases such as "with child" and "childbirth". See Webster's New International Dictionary (Second Ed.—Unabridged; 1959). The word "child" is not used in such a phrase anywhere in the AFDC title.

> "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." [*Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618.] We are of the view that the word "child" is commonly and ordinarily understood to mean a born child and not a fetus. Indeed, when it is intended to refer to a fetus it is usually modified by another word such as "unborn child."

The district court in *Parks* v. *Harden*, 354 F. Supp. 620, 623-624 (N.D. Ga.), reversed, No. 73-1855, decided December 2, 1974 (C.A. 5), similarly observed:

> As a matter of semantics, there simply is no way to conclude that the word "child" includes something else which is not a child, namely an unborn child. In legal terms, the unborn child is normally referred to as a fetus, or "quick," or *in utero* * * *.

If Congress had intended "child" to include fetus, surely it would have stated so in clear and unambiguous language. Cf. *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 414. It did not do so. To the contrary, nothing in either the statute or the legislative history suggests that Congress contemplated that a fetus would be included within the meaning of "child." We therefore conclude that a fetus is not a "child" within the meaning of the Act and that neither fetuses nor childless pregnant women are "eligible individuals".

2. This conclusion is not inconsistent with the Secretary's long-standing regulation (45 C.F.R. 233.90 (c)(2)(ii)) permitting the states, at their option, to make AFDC payments to pregnant women on behalf of themselves and their unborn children.[4] That regulation does not indicate an administrative understanding that Congress intended to provide such coverage. To the contrary, the Secretary has consistently taken the position that the statute does not require payments on behalf of a fetus as a "dependent child." See, *e.g.*, the briefs filed on behalf of the Secretary in *Murrow* v. *Clifford*, No. 114-73, decided June 12, 1973 (D. N.J.), vacated on other grounds, No. 73-1717, decided May 30, 1974 (C.A. 3); *Wilson* v. *Weaver*, 358 F. Supp. 1147 (N.D. Ill.), affirmed in part and reversed in part, 499 F.2d 155 (C.A. 7); *Adams* v. *Huecker*, No. 7815-B, decided June 14, 1974 (W.D. Ky.), appeal pending, No. 74-2213 (C.A. 6); *Stuart* v. *Canary*, 367 F.Supp. 1343 (N.D. Ohio).

The Secretary bases his regulation on his general discretionary rule-making authority under Section 1102 of the Act, 42 U.S.C. 1302. The Secretary interprets his authority under that provision as extending to the promulgation of regulations permitting payment of AFDC benefits on behalf of individuals other than "dependent children" where such pay-

[4] The regulations also provide for federal payment of one-half the administrative costs incurred by the states in verifying the fact of pregnancy. 45 C.F.R. 233.90(c)(3).

ments (1) are made on behalf of individuals who within a brief period will meet the statutory criteria for a "dependent child," (2) are consistent with and assist in achieving the purposes of the AFDC program, and (3) promote the efficient administration of that program. Pursuant to that view, the Secretary permits the states at their option to make AFDC payments on behalf of persons other than a "dependent child" in two limited circumstances: where a pregnant woman otherwise satisfies AFDC eligibility requirements, and where a needy child is, due to an emergency, living in the home of a nonrelative. '45 C.F.R. 233.90(c)(2)(ii) and (iv).[5]

In the Secretary's view, payments on behalf of a fetus are permissible because they assist the expectant mother to provide prospectively for the material needs of the child after birth, *i.e.*, when it has become a "dependent child," and also because they enable the expectant mother to maintain or improve her diet and general health and thereby increase the probability that she will give birth to a healthy child.

The court of appeals in *Wisdom* v. *Norton*, *supra*, expressed the view that the Secretary's regulations permitting payments on behalf of persons other than dependent children are invalid. But the validity of the Secretary's regulations was not before the court in *Wisdom* (~~home~~ moreover, the Secretary was not a party

[5] See also 45 C.F.R. 233.90(c)(2)(i) and (iii) (permitting payments for a full month on behalf of children living in the home for at least part of that month).

and did not file a brief in that case), nor is it at issue here.[6] The essential point here is simply that the Secretary's regulation in favor of needy pregnant women is not based upon an administrative understanding that a fetus is a "child" within the meaning of the Act. The agency charged with administration of the program has not interpreted the Act in a manner contrary to the position taken by the State.[7]

---

[6] Congress is aware of the Secretary's regulation and apparently has acquiesced in it. Legislation to overturn the Secretary's policy of permitting payments to expectant mothers was proposed, but not enacted, in the 92d Congress. See H. Rep. No. 92-231, 92d Cong., 1st Sess. 184; S. Rep. No. 92-1230, 92d Cong., 2d Sess. 467.

[7] This point is also demonstrated by the fact that the Secretary has, following *Townsend* v. *Swank*, *supra*, and *Carleson* v. *Remillard*, *supra*, continued to approve state AFDC plans that exclude fetuses and childless pregnant women from coverage.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1974 566358 09

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

v.

LINDA ALCALA, JANE DOE AND JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1708

KEVIN J. BURNS, Individually and in his capacity as Commissioner of the State of Iowa Department of Social Services; and

MICHAEL RYAN, Individually and in his capacity as Director of the Scott County Department of Social Services,

Petitioners,

v.

LINDA ALCALA, JANE DOE AND JOAN ROE, Individually and on behalf of all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

1. Is the Petitioners' policy of excluding unborn children and their mothers from AFDC eligibility

inconsistent with the Social Security Act, in particular 42 U.S.C. §§ 602(a)(10) and 606(a), and hence in violation of the Supremacy Clause of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

In addition to the Constitutional provisions, statutes, and regulations listed in Petitioners' Brief (at 2-3), the following are set forth in pertinent part in the text of this Brief: 42 U.S.C. §§ 602(a)(10), 606(b), 1302, 1304, 1396d(a); § 401, Social Security Act of 1935, 49 Stat. 620; 45 C.F.R. § 233.90(c)(3).

Excerpts from the following additional provisions are set forth in Addendum L: Handbook of Public Assistance Administration, Part IV, §§ 3400, 3410-3412 (1946); Iowa State Department of Social Services Employees' Manual, Items XII-1-10a, XII-1-10b, XII-1-14.

SUMMARY OF ARGUMENT

This Court's decisions in *King v. Smith*, *Townsend v. Swank*, and *Carleson v. Remillard* make it clear that in the absence of congressional authorization to the contrary clearly evidenced in statutory language or legislative history, the states may not impose definitional eligibility conditions for AFDC assistance which exclude applicants who are eligible under federal

standards expressed in 42 U.S.C. § 606. Moreover, if applicants are eligible under the definitions of § 606, then H.E.W. regulations making eligibility optional with the states are invalid. This Court's decision in *N.Y. State Dept. of Social Services v. Dublino* did not qualify or limit the *King-Townsend-Remillard Trilogy*, since the holding in that case was grounded on a rejection of the plaintiffs' "pre-emption" argument, and did not involve any question of definitional eligibility under 42 U.S.C. § 606.

It is clear that there is no congressional authorization in either the Social Security Act or its legislative history for the exclusion of unborn children and their mothers from AFDC assistance. Thus, the central issue is whether pregnant women are eligible for AFDC assistance with respect to their unborn children under the definitional standards of the Social Security Act. This issue turns on the question of whether an unborn child is a "dependent child" within the meaning of 42 U.S.C. § 606(a).

The "plain" or "common" meaning of the terms of the Social Security Act does not provide a clear answer to this question of statutory interpretation. Thus, it is necessary to look at (1) the statutory purposes of the Social Security Act, and (2) interpretation of the term "dependent child" by the agencies charged with the administration of the AFDC program.

The "paramount purpose of AFDC" is the protection of dependent children so that they may develop into useful citizens. Given the strong relationship between pre-natal welfare and nutrition and the subsequent mental and physical development – or even the survival – of the child, the exclusion of unborn children and

their mothers from AFDC assistance is totally inconsistent with the paramount purpose of the Social Security Act to protect children and foster their development.

Moreover, failure to provide financial assistance during the pre-natal period would render futile and ineffective the pre-natal services and nutritional advice that are funded through Title V of the Social Security Act. Especially in light of the Social Security Act's interest in the welfare of children, the health and educational services provided under Title V must sensibly be seen as complementary to, rather than exclusive of, necessary financial assistance under Title IV.

Congress' understanding that unborn children and their mothers are eligible for AFDC also has been demonstrated in its passage of Title XIX of the Social Security Act. Unless unborn children are "dependent children" under 42 U.S.C. § 606, a woman who is pregnant with her first child will not be entitled to pre-natal care under Title XIX – although a pregnant woman who is on AFDC because she has previously given birth to another child clearly is entitled to complete pre-natal medical care under that Title. This absurd distinction could not have been intended, but can be avoided only by recognizing that an unborn child is a "dependent child" for AFDC purposes.

Perhaps most significantly, H.E.W. and its predecessor agencies have for over 30 years interpreted the term "dependent child" in 42 U.S.C. § 606 as including unborn children. This long-standing interpretation of the term "dependent child" is consistent with the

purposes of the Social Security Act, and therefore should be followed by this Court, especially since 42 U.S.C. § 602(a)(10), the provision that requires that AFDC assistance be granted to "all eligible individuals," was enacted after the Bureau of Public Assistance (H.E.W.'s predecessor) had published its interpretation of 42 U.S.C. § 606(a) including unborn children within that section's coverage.

However, H.E.W.'s regulations making AFDC assistance with respect to unborn children optional with the States clearly are invalid in light of *Townsend v. Swank* and *Carleson v. Remillard*. Moreover, the recent disavowal of the interpretation of "dependent child" as including unborn children, in an H.E.W. amicus brief in *Adams v. Huecker*, both ignores the clear history of H.E.W. regulations concerning AFDC payments with respect to unborn children and hinges upon a totally untenable position with regard to H.E.W.'s rule-making powers under 42 U.S.C. § 1302, and is not entitled to any weight in this proceeding.

Thus, both statutory purpose and long-standing administrative interpretation show that unborn children are "dependent children" within the meaning of 42 U.S.C. § 606(a). Under *King*, *Townsend*, and *Remillard*, AFDC assistance therefore must be granted by the States to pregnant women with respect to their unborn children. Hence, the judgment below should be *affirmed*.

ARGUMENT

I.

STATES PARTICIPATING IN THE AFDC PROGRAM MAY NOT EXCLUDE INDIVIDUALS ELIGIBLE UNDER FEDERAL STATUTORY STANDARDS IN THE ABSENCE OF CLEAR CONGRESSIONAL AUTHORIZATION FOR SUCH EXCLUSION, H.E.W. REGULATIONS TO THE CONTRARY NOTWITHSTANDING.

The issue in this case is whether States participating in the Federal Aid to Families with Dependent Children (hereinafter "AFDC") program[1] must grant AFDC eligibility to unborn children and their mothers. This issue turns primarily on whether an unborn child is a "dependent child" within the meaning of 42 U.S.C. § 606(a).[2] Thus far, of the six circuit courts of appeal to consider this issue, five have ruled that an unborn child is a "dependent child" for AFDC purposes; the same result has been reached by fourteen of the eighteen district courts which have ruled on the issue.[3]

[1] 42 U.S.C. §§ 601-644.

[2] Except when otherwise indicated in the text, Respondents will cite to the United States Code sections covering the Social Security Act. Those section numbers can be converted to the Social Security Act section numbers by subtracting 200; thus, 42 U.S.C. § 606(a) is Social Security Act § 406(a).

[3] A listing of both the circuit and district court decisions may be found in the Fifth Circuit decision in *Parks v. Harden*, ____ F.2d ____, Addendum A, *infra*, at a5-6, n. 4. To Respondents' knowledge, that listing is complete, except for the omission of the decision in *Wisdom v. Norton*, ____ F.2d ____, Petitioners' Brief at 19 (2d Cir. 1974), which held that an unborn child was not a "dependent child" for AFDC purposes.

A. This Case is Governed by this Court's Holdings in *King v. Smith*, *Townsend v. Swank*, and *Carleson v. Remillard*.

As most of the lower courts which have ruled on the issues presented in this case have recognized, much of the necessary legal framework is contained in three recent decisions of this court on similar questions of AFDC eligibility: *King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971); and *Carleson v. Remillard*, 406 U.S. 598 (1972). *See also, Lewis v. Martin*, 397 U.S. 552 (1970). In *King v. Smith, supra*, Alabama had denied AFDC eligibility to a mother because she had been "cohabiting" with a man, who was not the father of any of her children and who had no legal relationship to the mother. Alabama considered the man a substitute "parent" and thus within 42 U.S.C. § 606(a)'s definition of "parent." Alabama argued that since the children had not been "deprived of parental support" under 42 U.S.C. § 606(a), the children and their mother were ineligible for AFDC. This Court held that the Alabama regulation was invalid because it conflicted with the AFDC provisions of the Social Security Act, both insofar as it was based on the state's asserted interest in discouraging illicit sexual behavior and illegitimacy, and insofar as it defined the term "father" to include a person who did not owe to the child a state-imposed legal duty of support. Under this Court's analysis in *King*, the Social Security Act determined the class of individuals to whom the states were required to grant assistance; State provisions that had the effect of narrowing that class, thus denying eligibility to some whom Congress intended to cover, were to that extent invalid because of the requirement

of 42 U.S.C. § 602(a)(10) that AFDC be provided to "all eligible individuals."

In determining that the word "parent" in 42 U.S.C. § 606(a) did not include a man who did not owe a state-imposed legal duty to support, this Court looked, not to the "plain" or "common" meaning of the word "parent," but rather to the legislative *purposes* of the AFDC program—of which the paramount purpose is the economic protection of children.[4] This reliance on statutory purpose, rather than "plain meaning," in interpreting the word "parent" became even more clear in *Lewis v. Martin*, 397 U.S. 552 (1970), in which this Court declared invalid California's "Man Assuming the Role of Spouse" rule, and approved H.E.W. regulations which prohibited the States from defining even a non-adoptive stepfather as a "parent"—*unless* he owed a legal obligation to support under a State law "of general applicability." 397 U.S. at 555-58.

In *Townsend v. Swank, supra*, an Illinois statute and regulation allowed AFDC payments to the child and mother if the child was attending high school or vocational school but denied benefits if the child was in a college or a university. Both the federal statute (42 U.S.C. § 606(a)(2)(B)) and H.E.W. regulations (45 C.F.R. § 233.90(c)(1)(vi)) implied that the states could vary eligibility from the federal standards. H.E.W. filed an amicus brief in *Townsend v. Swank* which essentially

[4] This Court emphasized that the statutory eligibility requirement of parental absence was founded on the theory that AFDC assistance would not be necessary for children living with a "breadwinner" parent who owed a duty to support those children (and who would be *able* to provide support because "the work relief program and . . . the revival of private industry would provide employment" for him). 392 U.S. at 327-328.

argued that 42 U.S.C. § 606 only defined the outer limits of federal financial participation and that the states therefore were free to use more restrictive eligibility standards than the federal standards. H.E.W. also argued that a restrictive state option governing AFDC eligibility should be presumed valid, with federal criteria governing only where explicit statutory authority or the "equitable treatment" or "Condition X" doctrine would so dictate.[5]

In striking down the challenged state regulation as inconsistent with the Social Security Act, this Court clearly rejected H.E.W.'s arguments on all points. Instead of presuming restrictive state standards to be valid, the Court put the burden of proof on the state to show that the exclusion was "clearly evidenced" either by the Social Security Act or by its legislative history.

> Thus *King v. Smith* established that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that *excludes persons eligible for assistance under federal AFDC standards* [emphasis added] violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that H.E.W. regulations seem to imply that states may to some extent vary

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[5] H.E.W.'s standard of "equitable treatment" or "Condition X" meant that "when a state exercises its statutory option to prescribe status eligibility criteria other than the ones outlined in the federal act, H.E.W. approves the plan only if the classification effecting such (additional) limitation is a rational one in the light of the purposes of public assistance programs." Comment, *Welfare's 'Condition X,'* 76 Yale L.J. 1222 (1967).

> eligibility requirements from federal standards. However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished 'to *all eligible* individuals.' [Emphasis in original.]

Townsend v. Swank, 404 U.S. at 286.

In *Carleson v. Remillard, supra*, California regulations had interpreted the phrase "continued absence" in 42 U.S.C. § 606(a)(1) to exclude from AFDC coverage the family of a serviceman who was absent because of his military service, on the ground that his absence was "temporary" and not "continued."[6] This Court held that eligibility for AFDC benefits had to be measured by federal standards, that the term "continued absence" as used in 42 U.S.C. § 606(a)(1) connoted that the parent could be absent for any reason, and thus that the California regulation violated the Social Security Act and was invalid under the Supremacy Clause. As in *King v. Smith*, this Court relied heavily on the purpose of Title IV to provide economic protection for children who were deprived of the support of a "breadwinner," and on H.E.W. regulations interpreting "continued absence" to include a military absence. 406 U.S. at 602-04. Citing *King v. Smith*, this Court again stated that eligibility for AFDC must be measured by federal standards—and that in the absence of congressional

[6] "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence of from the home, or physical or mental incapacity of a parent. . ." 42 U.S.C. § 606(a)(1).

authorization for the exclusion, *clearly evidenced from the Social Security Act or its legislative history*, a state eligibility standard that excluded persons otherwise eligible for assistance under federal AFDC standards violated the Social Security Act and was therefore invalid under the Supremacy Clause. 406 U.S. at 600. Finally, this Court rejected H.E.W.'s argument that since the term "continued absence" was unclear, that states should have the option to exclude children whose parents were absent for military reasons. 406 U.S. at 602.[7]

From *King*, *Townsend*, and *Remillard*,[8] the following related principles emerge:

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[7] As in *Townsend v. Swank*, *supra*, H.E.W. filed an amicus brief in *Carleson v. Remillard*, reiterating their view that 42 U.S.C. § 606 prescribed only the outer limits of federal matching funds and that the states were free to define "continued absence" more narrowly than H.E.W.'s definition. After this H.E.W. brief was filed in *Carleson v. Remillard*, the Court decided *Townsend v. Swank* and invalidated H.E.W.'s argument. H.E.W. then filed a second amicus brief in *Carleson v. Remillard* that sought to distinguish *Townsend v. Swank* on the basis that in the latter, the "eligible individuals" were clearly defined in the statute, while in the former, the statute itself mandated no definition of "continued absence" and thus the states should be free to apply more restrictive conditions, limited only by "Condition X." The H.E.W. brief also argued that if wide latitude were given general definitional terms in the Act, the "floodgates" would be opened and most state plans would be invalidated. Memorandum of the United States as *Amicus Curiae* in *Carleson v. Remillard*, Number 70-250 (O.T. 1971). This Court unanimously rejected these arguments, stating that "[w]e search the Act in vain . . . for any authority to make 'continued absence' into an accordianlike concept, applicable to some parents because of 'continued absence' but not to others." 406 U.S. at 602.

[8] *See also, Lewis v. Martin*, *supra*.

(1) In the absence of Congressional authorization, neither the states nor H.E.W. may impose more restrictive eligibility conditions on applicants for AFDC than those set out in the Social Security Act;

(2) In order for the state to exclude from coverage an applicant eligible under federal standards, the state must meet a heavy burden of showing legislative history or statutory language "clearly evidencing" Congressional intent to exclude the applicant: and

(3) H.E.W. regulations or legal positions purporting to make eligibility for certain groups of applicants optional with the states are of no effect in the absence of the clear evidence of Congressional intent referred to in (2), above.

As argued more fully *infra*, application of these principles shows that the Petitioners' policy of denying AFDC assistance with respect to unborn children is inconsistent with the Social Security Act.

B. This Court's decision in *N.Y. State Department of Social Services v. Dublino* did not Qualify the *King-Townsend-Remillard* Trilogy, and is Inapplicable to this Case.

In arguing that this case is not governed by the *King-Townsend-Remillard Trilogy*, the Petitioners rely heavily on (a) a single sentence of dictum, and (b) a footnote, both lifted out of context, from this Court's decision in *N.Y. State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973):[9]

[9]Petitioners' Brief at 6-7, 15-17.

(a) "In those cases [*King*, *Townsend*, and *Remillard*] it was clear that state law excluded people from AFDC benefits whom the Social Security Act *expressly* provided would be eligible . . . ."

413 U.S. at 421 (emphasis added);

(b) " 'So long as the States' actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the Courts may not void them."

413 U.S. at 423, n. 19.

In quoting the above language from *Dublino*, Petitioners place heavy emphasis on the word "expressly." The basic idea advanced by the Petitioners seems to be that unborn children are not "expressly" included in AFDC coverage, whereas children with a substitute "parent" (*King v. Smith*, *supra*), a non-adoptive stepfather (*Lewis v. Martin*, *supra*), or a father who is absent for military service (*Carleson v. Remillard*, *supra*) are "expressly" included in such coverage. But even a cursory glance at *King*, *Lewis*, and *Remillard* demonstrates that that distinction simply is not supportable. What the district court and court of appeals held in this case was precisely that 42 U.S.C. § 606(a) "expressly provided" for the eligibility of the unborn child as a "dependent child." Certainly an unborn child is as "expressly" included in the term "dependent child" as a substitute father or non-adoptive step-father is excluded from the term "parent" *if and only if* he has no state-imposed duty to support, or as a military absence is included in the term "continued absence." Indeed, that the characterization of the *King-Townsend-Remillard Trilogy* quoted from

Dublino does not mean that the words of the Social Security Act themselves must specifically and unambiguously provide for inclusion of unborn children is demonstrated by the fact that in *King*, *Lewis*, and *Remillard*, *supra*, this Court turned primarily to H.E.W. interpretations and the statutory purposes of Title IV – and not to the specific language of 42 U.S.C. § 606(a) – in deciding the eligibility questions presented in those cases. As argued *infra*, this case also requires an inquiry into H.E.W. interpretation and statutory purpose – both of which show that an unborn child is a "dependent child" for purposes of 42 U.S.C. § 606.

Both the context and holding of *Dublino* show that it does not "qualify" the *King-Townsend-Remillard Trilogy* and that it is in fact totally inapposite to this case. Unlike this case and the *Trilogy*, *Dublino* did not deal with state exclusions of applicants from AFDC assistance that conflicted with the definitions of eligibility contained in 42 U.S.C. § 606(a). Rather, the issue in *Dublino* was simply whether "that part of the Social Security Act known as the Federal Work Incentive Program (WIN)" completely "pre-empted" the use of state work programs in the administration of the AFDC program. 413 U.S. at 407. This Court held that in light of the statutory scheme and the purposes of the Social Security Act, the WIN program was not designed "to be all embracing," and therefore held that the WIN program did not completely preempt all use of state work programs. *But* this Court remanded the case to the lower court to determine whether any particular features of the state rules challenged therein conflicted with the Social Security Act. Significantly, this Court pointed to *Townsend v. Swank*, *supra*, as the polestar in

determining whether any such conflicts existed. 413 U.S. at 421.23.

Moreover, in citing not only *Dublino*, but also such other cases as *Wyman v. James*, 400 U.S. 309 (1971), and *Jefferson v. Hackney*, 406 U.S. 535 (1972), for the proposition that the States have "considerable latitude in allocating their AFDC resources,"[10] the Petitioners neglect the fact that this case does *not* involve any question as to the States' undoubted discretion in establishing standards of need and amount of assistance or in promulgating "supplementary regulations ... within the legitimate sphere of state administration," *N.Y. State Dept. of Social Services v. Dublino, supra*, 413 U.S. at 422. The Social Security Act for the most part leaves to the states the administration of their programs – including the specific mechanisms for determining and confirming which applicants in fact fall within the categories defined in 42 U.S.C. § 606 – and the determination of financial need standards. Thus, the Social Security Act nowhere dictates the level of income which constitutes "need" or the level of benefits which must be paid to recipients. *Jefferson v. Hackney, supra; Dandridge v. Williams*, 397 U.S. 471 (1970). Nor does the Act, or the Constitution, preclude reasonable administrative procedures designed to assure that those in whose behalf AFDC assistance is being paid are in fact needy and/or actually receiving the benefit of that assistance. *Wyman v. James, supra.*[11]

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[10]Petitioners' Brief at 7.

[11]In *James*, the central issue was whether AFDC recipients could be required to submit to "home visits" by caseworkers; the plaintiffs argued that such mandatory visits violated the Fourth Amendment. This Court rejected the plaintiffs' argument, holding

In neither *James*, nor *Jefferson*, nor *Dublino* was there any issue as to whether the plaintiffs fit within the categories of eligible individuals defined in 42 U.S.C. §606. In *King*, *Townsend*, and *Remillard*, however, the central issue consistently was whether the plaintiffs were included in the mandatory statutory definitions of § 606. There is of course no question that this case involves purely a question of categorical definition under 42 U.S.C. § 606, and hence the *Remillard* line of cases, rather than *Dublino*, should be applied. As shown in the succeeding sections of this brief, statutory purpose and federal administrative regulations both affirmatively indicate that unborn children are to be *included* in the term "dependent child"; at the same time, there is no expression, clear or otherwise, of Congressional intent to exclude unborn children from the coverage of the AFDC program. Therefore, under *King*, *Townsend*, and *Remillard*, unborn children and their mothers *must* be made eligible for AFDC assistance.

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that the home visits, though not specifically provided for in the Social Security Act, were reasonable administrative means of (1) ensuring that the children for whom assistance was being paid were actually physically present in the home, 400 U.S. at 322; (2) checking on impending medical needs, *id.*; (3) assuring the state "that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses," 400 U.S. at 319; and (4) informing the public of how its "charitable funds are utilized and put to work," *Id.*

II.

AN UNBORN CHILD IS A "DEPENDENT CHILD" WITHIN THE MEANING OF TITLE IV OF THE SOCIAL SECURITY ACT.

The crucial statutory provision in this case is 42 U.S.C. § 606. Section 606(b) provides, in pertinent part, that:

> The term "aid to families with dependent children" means money payments with respect to, . . . or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living . . . .

The term "dependent child" is defined in 42 U.S.C. § 606(a) (in pertinent part) as:

> a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather . . . ., or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen . . . .

Of course, Section 606 does not specifically use the term "unborn child," and therefore does not explicitly include or exclude unborn children. Thus, the central question is whether the term "dependent child" in 42 U.S.C. §§ 606(a)-(b) includes unborn children. The succeeding portions of this brief will show, on the basis

of "common meaning," statutory purpose, and administrative interpretation, that an unborn child is a "dependent child" for AFDC purposes.

A. The "Common Meaning" of the Words "Dependent Child" is not Sufficiently Clear to Dispose of this Case.

Although, as shown below, the "plain" or "common" meaning of the words "dependent child" does not clearly dispose of this case, it does provide a useful starting point. As an initial matter, the proposition that an unborn child is a "child" gains support from the very fact that an unborn child is *called* an "unborn child"; and it is difficult to imagine a child that is any more "dependent" than one that is as yet unborn. In *Wisdom v. Norton*, ____ F.2d ____ (2d Cir. 1974),[12] the court found significant the fact that when one wishes to refer to an unborn child, one used the modifier "unborn"; from this, that Court inferred that an unborn child probably was not a "child." Petitioners' Brief at 25. But this position can only be characterized as totally illogical: The fact that one uses modifiers to specify particular kinds of children does not mean that such children therefore are not children. Thus, for example, if one wants to identify a black child as such, one uses the modifier "black"; but that certainly does not imply that black children are not "children."

Although none of the lower courts that have ruled on the issues presented in this case has relied ultimately on

[12]Opinion attached to Petitioner's Brief as Addendum A.

dictionary definitions of the word "child," most of them have made reference to those definitions. *Webster's New Twentieth Century Dictionary* (Unabridged (2d ed. 1970)), *Webster's Unabridged Dictionary* (2d ed. 1969), and *Webster's New Third International Dictionary* (1969) define "child" as: "An unborn or recently born human being, fetus, infant . . . ." *Black's Law Dictionary* (Rev. 4th ed. 1968), although not including the unborn child in its definition of "child," notes under the definition of the word "living" that "[a] child in the mother's womb is living." *See, also, Oxford English Di tionary.*[13] *But see, Funk & Wagnall's Standard Dictionary, International Edition* (1958); *The Random House Dictionary of the English Language* (Unabridged) (1966); *Ballantine's Law Dictionary* (3d ed. 1969).

A few courts also have mentioned colloquialisms which use the word "child" in a sense which precludes the unborn child. Thus, the Court in *Wisdom v. Norton, supra*, referred to the saying, "I have two children and one on the way" as support for its conclusion that the "ordinary meaning" of words "would seem to bear against the appellees' position."[14] Actually, this saying is rather ambiguous on the question of the meaning of "child," since it would appear to mean "I have two children and one [child] on the way [to birth]." In any event, as the *Wisdom* Court itself seemed to recognize,[15] such colloquialisms are really no more

[13]It is interesting to note that the word "child" is derived from the gothic "kilpec" and "inkilpo" — which meant "womb" and "pregnant woman," respectively. J.A.H. Murray, *New English Dictionary* (Oxford 1893).

[14]Petitioners' Brief at 25.

[15]Petitioners' Brief at 25.

useful in determining the meaning of the words "dependent child" as used within the framework of the Social Security Act than are dictionary definitions. Certainly one can think of other colloquialisms (e.g., a pregnant woman as one who is "carrying a child" or "with child") which use the word "child" in the sense of the unborn child.[16]

As most of the courts that have ruled on the "unborn child-AFDC" issue have recognized, the upshot of any objective inquiry into dictionary definitions, or into the "common," "plain," or "ordinary" meaning of the words "dependent child," is simply that such an inquiry does not provide any clear answers in this case.[17] *See, e.g., Parks v. Harden*, ____ F.2d ____, Addendum A, *infra*, at (5th Cir. 1974); *Alcala v. Burns*, 494 F.2d 743, 746 (8th Cir. 1974); *Wilson v. Weaver*, 499 F.2d 155, 157 (7th Cir. 1974); *Alcala v. Burns*, 362 F.Supp. 180, 184 (S.D. Ia. 1973); *Carver v. Hooker*, 369 F.Supp. 204, 212 (D.N.H. 1973). However, that inquiry does clearly establish at least that as a starting point, the words "dependent child" may

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[16]"Sir, she came in great with child; and longing, saving your honor's reverence, for stewed prunes." Shakespeare, *Measure for Measure* (Act II, Scene I).

[17]In *Mixon v. Keller*, 372 F.Supp. 51, 54 (M.D. Fla. 1974), the court cited the testimony of a medical expert that "fetuses are never referred to medically or clinically as children . . . ." However, technical medical terminology is hardly helpful to the inquiry involved in this case.

reasonably be interpreted so as to include the unborn "child."[18] *Alcala v. Burns, supra* at 746.

B. The Statutory Purposes of the Social Security Act Show that an Unborn Child is a "Dependent Child" within the Meaning of 42 U.S.C. §606.

Since the term "dependent child" does not by itself provide any clear answers in this case, most of the lower courts have turned to an inquiry into legislative "intent" or "purpose," and have concluded from that inquiry that an unborn child is a "dependent child" within the meaning of 42 U.S.C. § 606(a).[19] Such an inquiry is of course not uncommon in cases turning on statutory interpretation, particularly with regard to the

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[18]In *Parks v. Harden,* 354 F.Supp. 620, 623 (N.D. Ga. 1973), the court concluded, without analysis, that "there simply is no way to conclude that the word 'child' includes something else which is not a 'child' namely, an unborn child." Interestingly, the *Parks* Court itself referred to an "unborn child." More significantly, that Court's above-quoted conclusion is belied by the fact that the vast majority of the courts which have ruled on this issue *have* concluded that an unborn child is a "child" – including the Fifth Circuit Court of Appeals, which reversed the district court's decision in *Parks. Parks v. Harden, supra* (Addendum A, *infra*).

[19]*See, e.g., Wilson v. Weaver,* 499 F.2d 155, 157-58 (7th Cir. 1974); *Alcala v. Burns,* 494 F.2d 743, 746 (8th Cir. 1974); *Whitfield v. Minter,* 368 F.Supp. 798, 802-803 (D. Mass. 1973); *Stuart v. Canary,* 367 F.Supp. 1343, 1345-47 (N.D. Ohio 1973); *Green v. Stanton,* 364 F.Supp. 123, 126 (N.D. Ind. 1973); *Alcala v. Burns,* 362 F.Supp. 180, 184 (S.D. Iowa 1973).

Social Security Act.[20] Thus, as noted above, in *King v. Smith, Lewis v. Martin,* and *Carleson v. Remillard, supra*, this Court relied heavily on the purposes of the Social Security Act, rather than the "plain meaning" of the words involved therein, to resolve the statutory interpretation questions that lay at the heart of those cases. Certainly it could not clearly be said in *Remillard* that the absence of a father due to military service was a "continued absence" merely on the basis of the words themselves; but that conclusion followed easily from Title IV's purpose to provide support for those children who were deprived of support from the "breadwinner" parent. 406 U.S. at 602-604. Nor would the "plain meaning" of the word "parent" distinguish between a non-adoptive stepfather *with* a state-imposed legal duty to support and a non-adoptive stepfather *without* such a duty; but this Court's inquiry into statutory purpose in *King v. Smith* and *Lewis v. Martin, supra*, resulted in the conclusion that for purposes of 42 U.S.C. § 606(a), the word "parent" included the former, but not the latter.

As in *Rosado, King, Lewis,* and *Carleson*, inquiry into the purposes of the Social Security Act is both appropriate and necessary in this case.[21] Moreover, since the provisions of the Social Security Act are remedial in nature, they are entitled to broad, generous interpretation. To treat the Act otherwise would be to "abuse

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[20] "Thus, Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." *Rosado v. Wyman,* 397 U.S. 397, 412 (1970).

[21] *See also, Shea v. Vialpando,* ____ U.S. ____, 94 S.Ct. 1746 (1974).

the interpretative process and to frustrate the announced will of the people." *A. H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).[22] As shown below, the inclusion of unborn children in the term "dependent child" within the meaning of 42 U.S.C. § 606(a) is fully consistent with the purposes of the Social Security Act; and, equally importantly, to exclude unborn children would be *inconsistent* with those purposes.

1. Exclusion of unborn children and their mothers from AFDC eligibility is inconsistent with the purposes of Title IV of the Social Security Act.

As this Court has explicitly recognized, "the paramount goal of AFDC" is the protection of dependent children. *King v. Smith, supra*, at 325. This is clearly reflected in the original version of Section 401 of the Act, which provided that the purpose of Title IV was to enable "each State to furnish financial assistance, as far as practicable under the conditions in each State, to needy dependent children. . . ." 49 Stat. 620 (1935). In 1956, that statement of purpose was amended to "emphasize that services to strengthen family life are *included* in the program's objectives"; the strengthening of family life was seen as "an

[22] "It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are time when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system." *Van Beek v. Sabine Towing Co.*, 300 U.S. 342, 350-51 (1937).

investment in future citizens."[23] Title IV thus is designed to protect needy dependent children from the often irreversible physical and mental harm that may result from economic deprivation, and to enable them to develop into independent, productive citizens.[24]

In light of the overriding purpose of Title IV to protect children from economic deprivation and thus foster their development, it simply would not make sense to exclude from AFDC eligibility needy unborn children whose economic interests were not protected by the presence in the home of a "breadwinner" parent. As shown by the uncontradicted district court testimony of Dr. Roy Pitkin, adequacy of nutrition during pregnancy has a direct and substantial relationship to the health and development of the child, both before and after birth. Single Appendix, pp. 13-16. It is clear that a mother's poverty and inadequate nutrition during pregnancy pose grave dangers to the child – dangers which may have serious and irreversible consequences following birth. For example, poverty and malnutrition during the pre-natal period are linked with a significantly increased likelihood not only of such relatively "benign" ailments as poor bone development, but also

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[23]S. Rep. No. 2133, 84th Cong., 1st Sess., June 5, 1956; reported in 1956 U.S. Code Cong. & Adm. News 3877, 3906 (emphasis added). *See*, 42 U.S.C. § 601.

[24]Title IV was restricted to children "deprived of parental support" only because it was understood that other children would be protected by the presence in the home of a "breadwinner" parent. *King v. Smith, supra* at 327-29.

of mental retardation, and even non-survival at birth.[25] Recognition of these relationships, although refined in recent years, is not new; they were clearly recognized in 1935, the year in which the Social Security Act was passed.[26] Indeed, Congress gave specific recognition to the relationships between pre-natal maternal welfare and the protection and development of children in passing Title V of the Social Security Act.[27]

From the above analysis, it is clear that in terms of their development – or even survival – dependent children are critically "needy" during the pre-natal

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[25]In part, this is because inadequate nutrition during pregnancy is a major determinant of low birth weight – which in turn is a major determinant of neo-natal survival, stillbirths, and subsequent physical and mental development. See Testimony of Dr. Pitkin, Single Appendix at 14-15; Supplemental Memorandum, Addendum B, *infra; Stuart v. Canary*, 367 F.Supp. 1343, 1346-47 (N.D. Ohio 1973).

[26]*See*, Garry & Steven, *A Review of Recent Work on Dietary Requirements in Pregnancy and Lactation*, 5 Nutrition Abstracts 855 (1935).

[27]Report of the Committee on Ways and Means, H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935). However, Title V cannot be looked at as the sole source of assistance for unborn children provided by Congress, since Title V provides only basic health services, such as nutritional *advice*. As argued more fully *infra*, to view Title V as the exclusive source of pre-natal protection would be to assume that Congress specifically intended to provide only partial, ineffective protection during that crucial period. Title V is more logically viewed as complementary to Title IV, with regard to both born and unborn children.

period.[28] Given the ultimate concerns of Title IV with the protection of children and their development into useful citizens, it would be incongruous to ignore the needs of children during the crucial pre-natal period, since without adequate assistance for the mother and child during that period, post-natal assistance would frequently be too little, too late.[29] In short, to interpret the words "dependent child" in 42 U.S.C. § 606(a) not to include unborn children is to assume that Congress was concerned with the development of children only insofar as they and their mothers survived the pre-natal and birth stages without irreparable mental or physical damage – hardly a likely assumption in light of the broad remedial purposes of the Social Security Act.[30]

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[28]Moreover, "a woman may be in need of more assistance during her pregnancy than after the birth of her child. While she is pregnant a woman may be prevented due to her physical condition from maintaining any form of employment. After birth the status of her health does not handicap her ability to obtain a meaningful source of income." *Wilson v. Weaver*, 499 F.2d 155, 158 (n. 4) (7th Cir. 1974).

[29]Moreover, additional post-natal care to attempt to ameliorate the harmful effects of pre-natal poverty (such as low birth weight or mental retardation, etc.) may be more expensive than the adequate pre-natal assistance that would have prevented those effects – even though such remedial care may not be able to repair the damage done by pre-natal neglect. *See, Unborn and Underfed*, Interim Report by the Chairman of the Subcommittee on Nutrition and Human Needs of the California Senate Committee on Health and Welfare (January 1973), Addendum C, *infra* at c4-c5.

[30]As stated in *Carleson v. Remillard*, *supra* at 604: "We cannot assume here, anymore than we did in King v. Smith, . . . that while Congress 'intended to provide programs for

The only court of appeals to hold that an unborn child is not a "dependent child" within the meaning of 42 U.S.C. § 606(a) relied to a considerable extent on its characterization of the statutory purpose of Title IV as being essentially and exclusively to "encourage the care of dependent children in their own homes or in the homes of relatives. . . ." *Wisdom v. Norton*, *supra*, Petitioners' Brief at 27 (2d Cir. 1974). On the basis of this characterization, the *Wisdom* opinion argued that "this concern that the mother be in the home to raise the child only comes into play once the child is born." *Id.* However, there are at least two serious problems with this view: (1) its basic premise, that the essential, exclusive statutory purpose of AFDC is to encourage women to stay home with their children, is clearly incorrect; and (2) even if that were the exclusive purpose of Title IV, failing to provide AFDC assistance to pregnant women on behalf of their unborn children would be inconsistent therewith.

The *Wisdom v. Norton* characterization of the purposes of Title IV does have some support in the present statement of purpose in 42 U.S.C. § 601, which includes the purpose of "encouraging the care of dependent children in their own homes or in the homes of relatives. . . ." However, the *Wisdom* opinion ignores several clear indications that the above-quoted portion

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the economic security and protection of *all* children,' it also 'intended arbitrarily to leave one class of destitute children entirely without meaningful protection.' " As noted *infra*, Title V of the Social Security Act does provide *some* protection for unborn children through health *services*; but those services would not be meaningful or effective without the financial assistance necessary to protect the mother and child during pregnancy.

of § 601 does not state the exclusive or overriding concern of Title IV.

First, the *Wisdom* characterization ignores the fact that the purpose originally stated in Section 401 of the Social Security Act was simply to enable each State "to furnish financial assistance . . . to needy dependent children. . . ." 49 Stat. 620 (1935). The language in that section concerning the care of children in the home was added in 1956 simply to "make explicit" a "major," but not exclusive objective of Title IV that previously had not been given sufficient attention. Nothing in the accompanying Senate Report or in the 1956 Amendments themselves indicated that those amendments were designed to change the basic thrust of the AFDC program to "furnish financial assistance . . . to needy dependent children. . . ."[31]

Second, Congress has made it abundantly clear since 1935 that the care of children in the home is not the exclusive—or even the major—thrust of the AFDC program. Rather, it is simply one of the preferences expressed in the ACT—but not to the detriment of the paramount goal of protecting children. Thus, for example, Congress has provided AFDC assistance to children placed in foster homes or in child-care institutions.[32] Moreover, AFDC payments also may be made on behalf of "children" between the ages of eighteen and twenty-one who are attending college or other educational institutions[33] —hardly a group with

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[31]S. Rep. No. 2133, 84th Cong., 1st Sess.; June 5, 1956; reported in 1956 U.S. Code Cong. & Adm. News 3877, 3905-3906.

[32]42 U.S.C. § 608; *see, King v. Smith, supra,* 392 U.S. at 324.

[33]42 U.S.C. § 606(a)(2); *Townsend v. Swank, supra.*

regard to which there can be any substantial interest in encouraging care in the home. Perhaps most significantly, both the WIN program, 42 U.S.C. § 602(a) (19), and state work programs–which this Court, in *N.Y. State Dept. of Social Services v. Dublino, supra*, recognized and held were not preempted by the WIN program–clearly cut against the purpose of encouraging parents to stay at home with their children to the exclusion of all other purposes.[34]

Third, the latter portions of the present version of 42 U.S.C. § 601 express a purpose to "help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . ." Given the serious and irreversible consequences that can result from pre-natal poverty and malnutrition, failure to provide protection during the pre-natal period may have a significant impact on the capability for self-support and "continuing parental care and protection."[35]

Finally, the *Wisdom* court's narrow characterization of the purposes of Title IV would imply that Congress' concern about encouraging care in the home was so strong that it precluded other considerations crucial to the development and protection of children–such as

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[34]Under 42 U.S.C. § 602(a)(19), most persons eligible for AFDC assistance are *required* to register for the WIN program. Mothers whose children are under the age of six are not *required* to do so, 42 U.S.C. § 602(a)(19)(A)(v), but may do so if they so desire, 42 U.S.C. § 602(a)(19)(A).

[35]*See, Alcala v. Burns*, 362 F.Supp. 180, 184 (S.D. Ia. 1973); *Parks v. Harden*, ____ F.2d ____, Addendum A, *infra*, at a22.

providing protection during the pre-natal period to avoid physical and mental damage to the child that could not be overcome after birth. That implication is both illogical and inconsistent with the Congressional expressions to the contrary noted above.

Of course, even if encouraging the care of children in the home by a parent or other relative were the overriding and ultimate purpose of Title IV, it is clear that the provisions of AFDC assistance to pregnant women on behalf of their unborn children would promote that purpose. First, insofar as a mother must work to support herself and her unborn child during pregnancy, the child is not being cared for in the more protected conditions of his or her home.[36] Second, and even more significantly, poor nutrition, inadequate health care, and poverty all are linked with increased risks of serious post-natal health problems and/or mental retardation of the sort that may strain the family relationship or require institutionalization of the child after birth. Finally, since poverty and accompanying poor nutrition and health care also increase the risk of maternal mortality,[37] lack of financial assistance during the pre-natal period further increases the chances that the surviving child will be raised, not by his or her mother in the home, but in an institution.

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[36]Moreover, if the mother must become indebted during the usually substantial portion of the pre-natal period during which she cannot work (or find work), she is more likely to be forced to work immediately after the birth of the child – and thus not care for the child in her home – in order to meet those debts.

[37]See Addendum B, at b4; Report of the Committee on Ways and Means, H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935).

In sum, although encouraging the care of children in the home is *one* of the subordinate purposes of Title IV, it is not its sole purpose, and does not override or conflict with the paramount goal of protecting dependent children.[38] And in any event, even the narrow purpose of encouraging the care of children in the home is clearly furthered by the provision of AFDC assistance during the pre-natal period. Thus, the statutory purposes of Title IV, however characterized, clearly support the conclusion that unborn "children" *are* "children" within the meaning of 42 U.S.C. § 606. And this conclusion becomes even more clear when one considers Title IV, not in isolation from the other provisions of the Social Security Act, but in light of other Titles as well, most significantly Title V and Title XIX.

2. Title V of the Social Security Act demonstrates Congressional concern with pre-natal protection and provides pre-natal health services that are complementary to AFDC assistance for the unborn.

Contemporaneously with Title IV, Congress also enacted Title V of the Social Security Act of 1935.[39] Title V was designed to provide "maternal and child welfare" services through state-administered programs.

> In Title V is it proposed that aid be given the States for other services very essential to the security of children. The first of these is aid for maternity and infancy welfare. . . . The need for

[38] *See, Wilson v. Weaver, supra,* 501 F.2d at 1247, n. 11.

[39] 42 U.S.C. §§ 701-716.

> such services has increased with the depression, and the fact that the maternal mortality rate in this country is much higher than in nearly all other progressive countries is certainly not to our credit.[40]

By 1938, federally approved plans for maternal and child welfare services under Title V were in operation in every state in the union.[41]

States have used federal funds under Title V for such services as pre-natal and postpartum clinics, public health nurse visitation programs, and "well-child clinics" for infants.

> The maternity and infant care projects promote public understanding of the importance of prenatal care in low-income neighborhoods, employ case finding methods . . . to find patients early in pregnancy, establish neighborhood clinics affiliated with hospitals, provide prenatal care, *nutritional advice*, homemaker services, public health nursing, and social services; and pay for hospital care for mothers and infants in hospitals staffed to give the quality of services high risk patients need.[42]

Thus, Congress clearly has recognized throughout the history of the Social Security Act that the health and well-being of the unborn child and its mother during the prenatal period are "essential to the security of

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[40]H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935).

[41]Third Annual Report of the Federal Security Agency: Social Security Board 125-26 (1938).

[42]Sen. Rep. No. 744, 90th Cong., 1st Sess. (1967), reported in 1967 U.S. Code Cong. and Adm. News at 3031-34. *See also*, H.R. Rep. No. 544, 90th Cong., 1st Sess. (1967). (Emphasis added).

children." Moreover, nutritional advice has been among the services provided under Title V.

Significantly, Title V provides funds only for *services*, such as health care and nutritional advice, and not for financial assistance on behalf of individual mothers. 42 U.S.C. §§701, 703. Thus, "Titles IV and V are qualitatively different weapons against poverty and deprivation, the latter providing medical services while the former disburses cash for the improvement of the home environment." *Carver v. Hooker*, 501 F.2d 1244, 1246 (1st Cir. 1974). Consequently, "the congressional concern evidenced by Title V with respect to prenatal care does not militate against an intention to assist the unborn through AFDC payments as well." *Id.*

Indeed, Congress' recognition that pre-natal welfare was "essential to the security of children," coupled with the provision of health services in Title V, *supports* a statutory purpose to provide financial assistance during the pre-natal period through Title IV. It would not make sense to provide funds for pre-natal health services and nutritional advice, but provide no funds for the pre-natal economic assistance that would enable the mother to follow that advice and thus protect her child's nutritional health. Without the prenatal financial assistance necessary to provide shelter and adequate nutrition for the welfare and development of the child (both before and after birth), Title V health services would often be useless or ineffectual.[43]

[43]This symbiotic relationship between economic protection and health services clearly is given recognition in Congress' extension of both Title IV and Title V funds for born children. As noted in *Carver v. Hooker, supra*, 501 F.2d at 1246, "because the medical services provided under Title V extend to born as well as unborn children, it seems incongruous that Congress would not make similar provision under Title IV."

Thus, Title IV and Title V are most sensibly viewed as complimentary programs that provide economic protection *and* health services for both born and unborn children.

3. The eligibility provisions of Title XIX (Medical Assistance) indicate that unborn children are covered by Title IV.

Further statutory evidence of a Congressional purpose to include unborn children in the term "dependent child" for AFDC purposes is found in the provisions of Title XIX of the Social Security Act.[44] Title XIX provides that "medical assistance" must be made available to all persons receiving categorical AFDC assistance under Title IV, subpart A of the Social Security Act. 42 U.S.C. § 1396a(a)(10)(A). For persons in this category, medical assistance must include, *inter alia*: (1) "inpatient hospital services"; (2) "outpatient hospital services"; (3) "other laboratory and X-ray services"; and (4) "physicians' services . . . whether furnished in the office, the patient's home, a hospital, a skilled nursing facility, or elsewhere. . . ."[45] Under federal and state definitions, these services include complete pre-natal health care for any individual who is receiving AFDC assistance.[46] Thus, a

[44] 42 U.S.C. §§ 1396-1396i.

[45] 42 U.S.C. §§ 1396(a)(1), (2), (3), (5); see § 1396a(a)(13)(A).

[46] 42 U.S.C. §§ 1396a, 1396d(a); 45 C.F.R. § 249.10(b)(5); Iowa State Department of Social Services Employees' Manual, p. XII-1-14.

pregnant woman in Iowa who is receiving AFDC assistance, by virtue of (1) being sufficiently needy and (2) already having one born child, receives complete pre-natal health care under Title XIX.

On the other hand, an equally needy woman who is pregnant for the first time, and who therefore is not eligible for AFDC assistance under the Iowa standards challenged in this action, is *not* entitled to such pre-natal assistance under Title XIX.[47] Of course, if anything, the woman who is pregnant with her first child is more likely to be in need of pre-natal care than one who has previously borne children; yet it is the latter, and not the former, who is given complete pre-natal care under Title XIX in any state which makes pregnant women ineligible for AFDC on behalf of their unborn children.

This anomaly clearly presents serious Equal Protection problems. Moreover, it is hard to imagine that the Congress which passed Title XIX intended such an irrational distinction. But given the language and structure of Title XIX, the only way in which the anomaly can be avoided is by interpreting the term "dependent child" in 42 U.S.C. § 606(a), consistently with the purposes of Title IV and the Social Security Act, so as to include unborn children and their mothers in AFDC coverage. Given the clarity with which entitlement to Title XIX medical assistance is restricted to those eligible for categorical assistance such as

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[47]42 U.S.C. § 1396a; Iowa State Department of Social Services Employees' Manual, pp. XII-1-10a, 10b.

AFDC,[48] and the clarity with which medical assistance under Title XIX includes pre-natal care, Congress must have understood that unborn children were included in AFDC coverage as dependent children. To conclude otherwise is to conclude that Congress meant to construct a totally arbitrary and capricious distinction between pregnancy "rookies" and "veterans" with regard to the availability of pre-natal medical care under Title XIX.[49]

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[48]Title XIX does permit states, at their option, to provide medical assistance to certain individuals not eligible for "categorical" assistance. 42 U.S.C. § 1396a(a); 45 C.F.R. § 248.10(b)(5). However, even this optional assistance would be available only to non-AFDC recipients who were under 21 years old, over 65 years old, or blind or disabled. 42 U.S.C. § 1396d(a). In any event, Iowa does not provide this optional assistance. Iowa State Dept. of Social Services Employees' Manual, pp. XII-1-10a, 10b.

[49]Although there may be some overlap between Title V and Title XIX services with regard to pregnant women and infants, 42 U.S.C. § § 701 *et seq.* do not specify what services should be provided under State plans, and, Title XIX services are far more comprehensive. For example, Title V services do not include physician's services (although state plans may provide for pre-natal clinics). *See,* S. Rep. No. 744, 90th Cong., 1st Sess., Nov. 14, 1967, reported in 1967 U.S. Code Cong. & Adm. News 2834, 3034-35. Moreover, at least as of 1967, Title V programs apparently were not operating in all counties in the United States. *Id.* Congress, in passing Title XIX, clearly recognized that Title V was not sufficient to meet the medical needs of mothers and infants, since it included AFDC recipients in the groups who were entitled to Title XIX assistance.

4. The Social Security Amendments of 1950 demonstrate Congressional intent to require the inclusion of unborn children in state AFDC programs.

The conclusion that the purposes of Title IV require the inclusion of unborn children in the "dependent children" eligible for AFDC assistance is strongly supported by the Social Security Amendments of 1950. These Amendments first added to the Act Section 402(a) (10),[50] the provision which this Court has held requires the provision of AFDC assistance to all individuals eligible under the definitional standards of 42 U.S.C. § 606. *Townsend v. Swank, supra; Carleson v. Remillard, supra.* This addition of Section 402(a) (10) in 1950 is particularly significant because at that time, the Bureau of Public Assistance, the agency charged with the administration of ADC, had already publicly interpreted the term "dependent child" in Section 406(a) to include unborn children.[51] Thus, according to the agency charged with administering ADC, unborn children were eligible for ADC assistance when Congress enacted the statutory provision that required payment of ADC to "all eligible individuals."

Moreover, the Social Security Amendments of 1950 first included, in the definition of "aid to dependent children" in Section 406(b) of the Act, funds to meet the needs of the parent or other relatives with whom eligible "dependent children" were living.[52] This

[50]Social Security Amendments of 1950, § 321(b), 64 Stat. 550 (1950).

[51]Handbook of Public Assistance Administration, Part IV, § 3412(6) (1946). See also text accompanying notes 66 - 70, *infra.*

[52]Social Security Amendments of 1950, § 323, 64 Stat. 551 (1950).

amendment was an explicit recognition that the needs of the child could be met only if those of the caretaker relative also were met–a fact which applies with particular force to needy unborn children.

5. The provisions of the Social Security Act other than 42 U.S.C. §606(a) are not helpful in resolving the issues in this case.

Petitioners' argument with regard to the meaning of "dependent child" consists primarily of a listing of various out-of-context phrases and provisions from Title IV–none of them from 42 U.S.C. § 606(a)–which Petitioners assert would not make sense "if the word 'fetus' were substituted for the word 'child' " therein.[53]

[53]While the Petitioners attempt to construct an argument out of isolated sections of the Social Security Act, a potential *amicus* herein goes even farther afield to search for support. Thus, the Brief as Amicus Curiae in Support of Appellant [sic] on Behalf of Pacific Legal Foundation (at 7-9) points to the use of the word "child" in such diverse statutes as 30 U.S.C. § 922(a)(3) (benefits for victims of black lung disease), 8 U.S.C. § 1401(a) (establishment of U.S. citizenship), and 26 U.S.C. § 151 (dependent for tax exemption purposes). Interestingly, the *amicus* is only able to assert with regard to 30 U.S.C. § 922(a)(3) that "it has never been *contended* that the program was intended to benefit the unborn. . . ." (Brief at 7; emphasis added.) More importantly, the *amicus* ignores the fact that the statutes cited in its brief have totally different purposes from those of Title IV the Social Security Act. There certainly is no comparison, for example, between the concerns of the Social Security Act and those of the statutes which define the circumstances under which one will become a citizen of the United States. As has been shown above, the purposes of the Social Security Act are central to the proper interpretation of the term "dependent child" in this action, and thus citations to statutes with totally different purposes are simply not helpful. Moreover, as discussed more fully *infra*, the inclusion of unborn children in the term "dependent child" for AFDC purposes is supported by long-standing administrative interpretation – a factor not present with regard to the diverse statutes cited by the *amicus*.

Petitioners' Brief at 9-10. This argument by listing suffers from at least two obvious flaws.

First, contrary to the Petitioners' assertion, some of the provisions which they cite do make sense with regard to both unborn children and born children. For example, Petitioners emphasize the word "living" in the phrase "with whom they [children] are living";[54] indeed, "a child is 'living with' his mother more directly *in utero* than at any other time." *Carver v. Hooker, supra*, 501 F.2d at 1246.[55]

Second, and more importantly, most of the provisions to which Petitioners point are designed to deal with special problems posed by particular groups of children who are eligible for AFDC assistance, and have no effect on eligibility under 42 U.S.C. § 606. For example, Petitioners point to 42 U.S.C. § 602(a)(7), which provides that the states should, "in determining need, take into consideration income and resources of any child . . . ." The Petitioners' argument seems to be that since an unborn child cannot have income, and hence § 602(a)(7) could not apply to such a child, the entire Social Security Act is inapplicable to the unborn. But the fact that a particular section of the Act does not apply to unborn children does not mean that the entire Act is inapplicable. Section 602(a)(7) simply reflects the fact that those few children who happen to

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[54]"A child in the mother's womb is living." *Black's Law Dictionary* (4th Rev. Ed. 1968) (Definition of "living").

[55]The phrases quoted by Petitioners from 42 U.S.C. §§ 602(a)(16), 604(b), and 605(c) similarly "apply quite as well to the unborn as to the born child." *Carver v. Hooker, supra* at 1247-48.

have income pose special problems with regard to determining need; but this obviously does not mean, as Petitioners' argument logically would imply, that only children with income would be eligible for AFDC assistance.

Similarly, the Petitioners' argument with regard to 42 U.S.C. § 602(a) (17) (A) (i) (which provides that states should attempt to establish the paternity of children "born out of wedlock"), apparently is that this provision restricts AFDC coverage to born children. The Petitioners, however, do not explain why the "logic" of this argument does not also serve to limit AFDC coverage to illegitimate children–since § 602(a) (17) (A) (i) clearly applies only to such children. Again, it is clear that § 602(a) (17) (A) (i) is designed to deal with a particular problem that is presented by some–but certainly not all, or even most–children eligible for AFDC assistance. In short, "the fact that *certain* of the Act's provisions can sensibly be applied only to a child who is born does not necessarily exclude the unborn from the Act's ambit." *Parks v. Harden*, ____ F.2d ____ (Addendum A, *infra* at a21).[56]

[56]Similarly, the language quoted by Petitioners from 42 U.S.C. § § 606(a)(8)(A)(ii), 602(b)(2), and 605 deals only with special problems not related to eligibility. Section 602(a)(8)(A)(ii) is not distinguishable in this regard from § 602(a)(7) (discussed above); Section 602(b)(2) (which was made ineffective by this Court's decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969)) was simply aimed solely at curbing hardships resulting from excessively long state-imposed residency requirements, *Shapiro v. Thompson, supra* at 639-40, and not at § 606's definitional eligibility standards; and § 605 is intended to deal with special problems resulting from parental neglect, and not to require such neglect as a condition of eligibility.

6. The existence of other public assistance programs does not imply Congressional intent to exclude unborn children and their mothers from the AFDC program.

In support of their contention that Congress intended to exclude unborn children from the definition of "dependent child" in 42 U.S.C. § 606(a), Petitioners argue that:

> Congress, in limiting the AFDC program to children (rather than fetuses) was undoubtedly aware that needy prospective mothers would be granted alternative public assistance. Shelter, food, medical assistance and clothing are items included in Iowa's general relief program (Chapter 252, Code of Iowa, 1973). Congress in the food program, provides food stamps and double commodities for needy pregnant women.
>
> Petitioners' Brief at 7-8.

However, none of these "alternative" welfare programs indicates an intention by Congress to exclude unborn children from the AFDC program, for a number of reasons.

First, with regard to Iowa's general relief program, Petitioners fail to point out that the provision of assistance under that program is totally discretionary, on a county-by-county basis.[57] Moreover, nothing in the record of this case indicates that the level of assistance (if any) typically granted by Iowa counties has ever been equivalent to the assistance provided under Title

[57] *See*, Sections 252.1, 252.27, 252.31-252.34, Code of Iowa (1973).

IV.[58] In any event, Petitioners' argument that Congress would have taken "legislative notice" of the availability of county relief programs proves too much: If the availability of such programs would have motivated Congress not to provide assistance to pregnant women on behalf of their unborn children, why would it not also have motivated Congress to rely on such assistance for *born* children?

Nor are the Petitioners' references to federal food programs relevant. Since the Food Stamp Act was not enacted until 1964,[59] it is difficult to see how its provisions could have affected the issue of whether unborn children were included in the definitions of 42 U.S.C. § 606(a). Moreover, the Food Stamp Act clearly has not been interpreted as a substitute for public assistance such as AFDC, since AFDC recipients are

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[58]In this regard, it is interesting to note that in 1946, the Iowa Department of Social Welfare publicly complained that even with regard to those who were receiving ADC benefits, only some Iowa counties were providing adequate supplemental assistance through general relief. Iowa State Department of Social Welfare, *Annual Report* 9 (1946). In a very real sense, the fact that Petitioners are involved in this lawsuit demonstrates that "alternative public assistance" through general relief programs is not comparable to AFDC assistance: If it were clear that the exclusion of unborn children from AFDC assistance simply would result in their being adequately protected by state and local government funds, the State of Iowa would have no interest in opposing this action (and refusing to participate in H.E.W.'s "optional" program of AFDC assistance for unborn children), since the result of their "winning" would be to impose additional financial burdens on the state and its governmental subdivisions.

[59]Food Stamp Act of 1964, 78 Stat. 703 (1964); 7 U.S.C. §§ 2011-2026.

eligible for food stamp assistance under federal statutes and regulations.[60]

Finally, 42 U.S.C. § 1786, which provides for a "supplemental food" program for pregnant and lactating women who fall in certain categories and live in certain geographical areas, also does not imply that Congress intended to omit unborn children and their mothers from AFDC coverage. In the first place, § 1786 was not enacted until 1972,[61] and, as in the case of the Food Stamp program, it is therefore hard to see how this could have influenced unborn child coverage under Title IV. Moreover, as demonstrated by the amicus brief filed herein by the State of Arizona, the supplemental food program envisaged by § 1786 need not cover all of the political subdivisions of a state. Arizona Amicus Brief at 9-10.[62] Finally, § 1786 on its face is a

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[60] *See,* 7 U.S.C. §§ 2019(d), 2019(e)(7); 7 C.F.R. § 271.4(a)(1); 45 C.F.R. § 233.20(a)(2)(4)(a). In terms of the adequacy of Food Stamps as a replacement for AFDC assistance, it is interesting to note that a study in Sacramento County, California, showed that at least 90% of AFDC families were unable to maintain food purchasing power at the level of the USDA low-cost plan, and that two-thirds of such families were able to afford no more than 75% of USDA's recommended minimum expenditure – figures which reflected the inclusion of the value of bonus food stamps in the purchasing power of the surveyed families participating in the food stamp program. California Assembly Committee on Health and Welfare, *Malnutrition: One Key to the Poverty Cycle* 12 (January, 1970).

[61] Pub. L. 92-433, § 9, 86 Stat. 729 (1972).

[62] Indeed, those programs specifically are limited to "residents of areas *served by clinics or other health facilities* determined to have significant numbers of infants and pregnant and lactating women at nutritional risk." 42 U.S.C. § 1786(d) (emphasis added).

supplemental food program—as is demonstrated by the fact that it covers lactating women and infants who are also eligible for AFDC benefits.[63]

C. Long-standing Interpretation of 42 U.S.C. §606(a) by the Agencies Charged with the Administration of the AFDC Program Establishes that Unborn Children Must be Included in AFDC Coverage.

Any doubts about the inclusion of unborn children in the term "dependent child" in 42 U.S.C. § 606(a) are removed by the long-standing interpretation of that term by the agencies charged with the Act's enforcement—an interpretation which clearly includes unborn children. The Code of Federal Regulations, 45 C.F.R. § 233.90 provides in pertinent part that:

> (c)(2) Federal financial participation is available in:
>
> * * *
>
> (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis . . . .

Moreover, 45 C.F.R. § 233.90(c)(3) provides that

> Federal financial participation (at the fifty percent rate) is available in any expenses incurred in establishing *eligibility* for AFDC, *including expenses incident to obtaining necessary information to determine the . . . pregnancy of a mother.*
>
> (Emphasis added.)

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[63]Moreover, in 1973, the Iowa Department of Social Services noted that its Supplemental Feeding Program had been hampered by the stopping of federal funds. *Annual Report* 9 (1973).

Thus, under the federal regulations that govern the AFDC program, states may receive federal matching funds for AFDC payments with respect to unborn children. As noted by many of the lower courts that have ruled on the eligibility of unborn children for AFDC assistance, the provision of matching funds for AFDC assistance to the mothers of unborn children must logically be based on H.E.W.'s interpretation of the term "dependent child" in 42 U.S.C. § 606(a) to include unborn children, since otherwise there simply would be no authority in the Social Security Act for such payments.[64] Moreover, as these same courts have held, if the term "dependent child" is defined to include unborn children, then under *Townsend v. Swank* and *Carleson v. Remillard, supra*, the participating states *must* include unborn children in AFCD coverage unless there is clear Congressional authorization for their exclusion. None of the lower courts has found such authorization.

The conclusion that H.E.W. has interpreted the statutory term "dependent child" to include unborn children need not rest solely on the logic outlined above. The history of 45 C.F.R. § § 233.90(c) (2) and 233.90(c) (3) also shows conclusively that for over thirty years H.E.W. consistently has based its funding of AFDC assistance with respect to unborn children on

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[64]*See, e.g., Carver v. Hooker, supra,* at 1247; *Alcala v. Burns, supra,* 494 F.2d at 746; *Doe v. Lukhard, supra,* 493 F.2d at 60; *Alcala v. Burns, supra,* 362 F.Supp. at 185; *Doe v. Lukard, supra,* 363 F.Supp. at 826-27; *Wisdom v. Norton,* 372 F.Supp. 1190, 1192 (D. Conn. 1974), reversed, ____ F.2d ____ (2d Cir. 1974) (Petitioner's Brief at 19).

that interpretation.[65] The present regulations grew directly out of a 1940 audit exception to the Wisconsin ADC program, which had been paying ADC assistance on behalf of unborn children.[66] In considering this audit exception, the Social Security Board and the Bureau of Public Assistance (the division of the Board in charge of ADC) consistently regarded the issue as being one of definitional eligibility under §406 of the Social Security Act.[67]

Thus, in a Memorandum of May 27, 1940, the Bureau of Public Assistance, Division of Standards and Procedures, recommended that

> payments to an appropriate relative who is otherwise eligible to receive aid to dependent children may include an amount for an unborn child *to whom the terms of the definition in Section 406* of the Federal Social Security Act *may be found presumptively to obtain.*
>
> (Addendum E, *infra*) (emphasis added).

Subsequently, a Memorandum of July 3, 1940, from the Bureau of Public Assistance to the Chicago Regional Director, giving the latter advance information regarding the thinking of the conference of the Social Security Board on the unborn child issue, stated that

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[65]The optionality of that funding clearly has been based on H.E.W.'s additional interpretation – rejected by this Court in *Townsend* and *Remillard* – that 42 U.S.C. § 606 merely defined the outer limits of State participation in the AFDC program. See notes 5-7, *supra.*

[66]*Doe v. Lukhard*, 363 F.Supp. 823, 829 (E.D. Va. 1973); *Parks v. Harden*, 354 F.Supp. 620, 625 (n. 5) (N.D. Ga. 1973); Memorandum of June 25, 1940, from Bureau of Public Assistance to Chicago Regional Director (Addendum D., *infra*).

[67]42 U.S.C. § 606.

> [i]t was the consensus of the conference that legally it was possible to recognize the existence of a child prior to its birth. For purposes of Federal matching, therefore, *it is felt that section 406(a) of the Social Security Act governing the age of a dependent child could be interpreted to include a child prior to its birth.*

(Addendum F, *infra*) (emphasis added).

A Summary of Board Action dated May 21, 1941, indicated that the question of the "proposed interpretation of Section 406(a)" to include unborn children in the ADC program was deferred until the next meeting. (Addendum G, *infra*). A Memorandum of the same date from A.D. Smith to the Assistant General Counsel, arguing for the inclusion of unborn children in the AFDC program, noted that the issue of the coverage of unborn children had been under advisement "practically ever since the beginning of the program." Moreover, Smith noted that unborn child coverage was consistent with the remedial purposes of AFDC legislation, and further stated that "what we are doing is once more simply to define the word 'child.'" (Addendum H, *infra* at 1, 2.)[68]

The decision of the Social Security Board permitting Wisconsin's payment of ADC assistance with respect to

[68]This Memorandum of A.D. Smith referred to an earlier "lengthy memorandum" which Smith had drafted in 1939 on the same issue. That Memorandum, dated March 23, 1939, also argued that "[a]fter all, we are merely construing the word "child." (Addendum I, *infra.*) It is interesting to note that the A.D. Smith Memorandum of May 21, 1941, contains the notation "Definition of Dependent child" in the upper right hand corner, apparently for filing purposes.

unborn children was communicated to the Chicago Regional Director in a Memorandum of August 23, 1941, from Peter Kasius, the Acting Director of the Bureau of Public Assistance. (Addendum J; *infra*.) That Memorandum indicated that the decision in the Wisconsin case could be used as precedent in future cases in which other States wished to include unborn children in their ADC programs "by similar interpretation." Unborn children were referred to as "children now covered by section 48.331 of the Wisconsin statutes."[69]

These decisions by the Social Security Board, all of which clearly were regarded as interpretations of the terms of § 406 of the Social Security Act, were formalized in 1946 in the Handbook of Public Assistance Administration, Part IV, § 3412. Section 3400 of that Part, in introducing the following sections, stated that "[s]everal factors combine to make up the *definition of 'dependent child'* as used in Title IV of the Social Security Act." (Emphasis added.) Section 3412 itself made clear that it was an "interpretation" of Section 406(a); and § 3412(6) specifically provided that:

> When the mother's pregnancy has been determined by medical diagnosis, Federal participation in payments on behalf of an unborn child may be claimed on the basis of the same eligibility conditions as apply to *other children*.
> (emphasis added.)

Section 3412 of the Handbook of Public Assistance Administration, *supra*, has now been codified in

[69]Like the A.D. Smith Memorandum of May 21, 1941, the top of this Memorandum included the notation "Definition of dependent child."

somewhat altered form in 45 C.F.R. §§ 233.90(c) (2) and (3). As shown above, although these provisions, like their predecessors in the Handbook, do not directly define "dependent child," it is clear from their history and from the structure of the Social Security Act that those regulations are based on the Social Security Board's original interpretation of "dependent child." This was confirmed in Policy Information Release No. 37 of the H.E.W. Welfare Administration Bureau of Family Services (February 4, 1965) (Addendum K, *infra*). That Release consistently refers to unborn children as "children"—and stresses that "[a] State may include unborn children in its approved AFDC plan and received Federal financial participation in payments to meet their need, if such children meet the definition of "dependent child" in Section 406(a) of the Act."[70]

The Second Circuit Court of Appeals in *Wisdom v. Norton, supra*, in reaching the conclusion that unborn children and their mothers are not eligible for AFDC assistance under 42 U.S.C. § 606(a), relied heavily on the position taken in an H.E.W. amicus brief in *Adams v. Huecker* (Civ. No. 7815-B, U.S.D.C., W.D. Ky.) that the term "dependent child" does not include unborn children, and that its extension of federal assistance, at the States' option, for AFDC payments with regard to unborn children is based upon H.E.W.'s rulemaking power under 42 U.S.C. § 1302.[71] But as shown above,

[70]The Policy Release specifically disapproved the practice of granting AFDC assistance on behalf of unborn children whose mothers had already borne other children, but not on behalf of those whose mothers had borne no other children.

[71] *Wisdom v. Norton, supra*, Petitioners' Brief at 30-31.

the position taken by H.E.W. in *Adams* clearly ignores a long-standing history of interpretation by H.E.W. and its predecessor agency that an unborn child is a "dependent child" for AFDC purposes.[72]

Moreover, H.E.W.'s new-found position in *Adams* with regard to its powers under 42 U.S.C. § 1302 is as untenable as its earlier position, rejected in *Townsend* and *Remillard*, that 42 U.S.C. § 606(a) merely defined the "outer limits" of AFDC eligibility and that the states could vary eligibility requirements within those outer limits. Section 1302 merely gives to the Secretary of H.E.W. the power to make such rules and regulations, "*not inconsistent with this chapter*, as may be *necessary* to the *efficient administration* of the functions with which [he] is charged under this chapter." (Emphasis added). Certainly it cannot sensibly be argued that the payment of AFDC assistance to unborn children is "necessary to the efficient administration" of the AFDC program, unless unborn children are eligible as "dependent children" under 42 U.S.C. § 606(a).[73]

Finally, 42 U.S.C. § 1304 specifically provides that "[t]he right to later, amend, or repeal any provision of this chapter is reserved to the Congress." Clearly,

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[72]The *Wisdom* court apparently was unaware of this history. See Petitioners' Brief at 30, n. 36.

[73]This is particularly clear when such payments are optional with the states: If the program is necessary to the administration of AFDC in one state, it is difficult to see why it is not equally necessary in the other states as well – or why it is the states, rather than the Secretary of H.E.W., which determine whether the payments with respect to unborn children are so necessary.

Congress did not intend in § 1302 to give the Secretary of H.E.W. blanket authority to create new programs or classes of eligible individuals on behalf of whom Title IV funds could be expended. Such a "blank check" would in effect give the Secretary a right to legislate that is specifically reserved to Congress by Section 1304.

With regard to H.E.W.'s position in *Adams v. Huecker, supra*, it is interesting to note that as recently as the issuance of the district court's supplemental opinion in *Wilson v. Weaver*, 358 F.Supp. 1147 (N.D. Ill. 1973), H.E.W., through its amicus brief in that case, was justifying its policy of paying AFDC matching funds on behalf of unborn children at the options of the states on the related theories (1) that the meaning of the term "dependent child" was unclear, while the meanings of "parent" and "continued absence" in *Townsend* and *Remillard* were clear, and (2) that the provisions of 42 U.S.C. § 606 were not mandatory on the states. 358 F.Supp. at 1153.[74] H.E.W. made no mention of 42 U.S.C. § 1302 in the *Wilson* case—and apparently did not do so until its May 2, 1974, amicus brief in *Adams v. Huecker, supra.*[75] Given the long-standing interpretation by the Bureau of Public Assistance and H.E.W. of the words "dependent child" as including unborn children, and the untenability of H.E.W.'s newly discovered position with regard to its powers under 42 U.S.C. § 1302, the shifting of H.E.W.'s justification for its optional unborn child program

[74]The District Court in *Wilson v. Weaver* properly rejected both of these arguments on the authority of *Townsend* and *Remillard. Id.*

[75]*See, Wisdom v. Norton, supra,* Petitioners' Brief at 31, n. 38.

seems simply to be an effort to evade the consequences of this Court's holdings in *Townsend v. Swank* and *Carleson v. Remillard* with regard to the mandatory nature of the eligibility definitions in 42 U.S.C. § 606(a).

From the preceding analysis, it is clear that the long-standing interpretation of the words "dependent child" in 42 U.S.C. § 606 by the agencies charged with the administration of AFDC includes unborn children. That interpretation should be given great weight by this Court, and "should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."[76] As noted above, there not only is no compelling indication that the interpretation of "dependent child" to include unborn children for AFDC purposes is wrong, but every indication that this interpretation is consistent with the purposes of the Social Security Act. Hence, it should be followed by this Court.[77]

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[76] *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 381 (1969); *see also, Zemel v. Rusk*, 381 U.S. 1, 10-11 (1965); *Lewis v. Martin, supra; Alcala v. Burns, supra*, 494 F.2d at 746; Note, "Statutory and Constitutional Bases for Extending AFDC Benefits to Families with Unborn Children," 48 So. Calif. L. Rev. 121, 138 (1974).

[77] This conclusion is also supported by the fact that 42 U.S.C. § 602(a)(10), the provision which makes 42 U.S.C. § 606's eligibility definitions mandatory on the states, was enacted after the publication by the Bureau of Public Assistance, in the Handbook of Public Assistance Administration, Part IV, § 3412 (1946), of its interpretation of the term "dependent child" in 42 U.S.C. § 606(a) as including unborn children. Social Security Amendments of 1950, § 321(b), 64 Stat. 550 (1950). Moreover, as noted in *Parks v. Harden, supra*, (Addendum A at a23), and *Carver v. Hooker, supra*, 501 F.2d at 1246-47, Congress in 1972 rejected proposed amendments to Title IV which would specifically have excluded unborn children from eligibility for AFDC assistance.

While H.E.W.'s interpretation of "dependent child" should be followed, it is clear that H.E.W.'s position that unborn child coverage is optional with the states is unacceptable:

> the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402 (a) (10) that aid be furnished "to *all eligible* individuals."
>
> *Townsend v. Swank, supra*, 404 U.S. at 286.

In this regard, the State of Florida, in its Amicus Brief (at 20), complains that to give weight to one administrative interpretation while rejecting another would be "illogical." But to say that weight should be given to one statutory interpretation by an administrative agency certainly is not to say that all such interpretations must be accepted. Thus, for example, in *Carleson v. Remillard, supra*, this Court took account of H.E.W.'s interpretation of "continued absence" as including military absences, but refused to accept H.E.W.'s position that coverage of children whose parents were "militarily" absent was optional with the states. 406 U.S. at 602.[78]

In this action, H.E.W.'s long-standing interpretation of the words "dependent child" is entitled to considerable weight; but the administrative judgment

[78] Indeed, it is Florida's position which does not make sense: That position would require either that *all* judgments of an administrative agency be accepted, or that *none* of them be given weight. But, clearly, an administrative agency may be correct about some things and wrong about others – as *Carleson* demonstrates.

with regard to optionality clearly has been rejected by this Court. Where the words of the statute do not themselves give clear guidance, and where the purposes of the Social Security Act point strongly toward inclusion of unborn children in the AFDC program, the administrative agencies' long-standing interpretation of the term "dependent child" should be followed.

CONCLUSION

As shown above, although the language of the Social Security Act itself is not clear, both the purposes of the Social Security Act and long-standing administrative interpretation show that unborn children are "dependent children" for AFDC eligibility purposes—a conclusion that has been reached by five of the six Circuit Courts of Appeal that have ruled on this issue.[79] Moreover, although the constitutional issues raised by the Respondents at the district court level are not directly involved in this Court, the conclusion that unborn children are "dependent children" under 42 U.S.C. § 606(a) also is reinforced by the fact that it avoids the necessity of passing on those constitutional

[79]See note 3, *supra*. Significantly, the only "minority" Circuit Court of Appeals opinion relied in substantial part on an H.E.W. disavowal of its long-standing interpretation of the words "dependent child" to include unborn children – a disavowal which ignored both the history of crucial H.E.W. regulations (history apparently unknown to the Circuit Court) and relied on an untenable view of H.E.W.'s rule-making powers under 42 U.S.C. § 1302.

issues.[80] Thus, although Congress has "voiced its wishes in muted strains," discovery of the "theme in the cacophony of political understanding" of the Social Security Act clearly requires the inclusion of unborn children among the needy children who are protected under Title IV of that Act.

For the reasons stated above, the decision of the Court of Appeals for the Eighth Circuit in this action should be *affirmed*.

Respectfully Submitted,

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[80] *Townsend v. Swank, supra,* 404 U.S. at 291. *See also, Carver v. Hooker, supra,* 501 F.2d at 1248; *Whitfield v. Minter,* 368 F.Supp. 798, 804 (D. Mass. 1973); Note, "Statutory and Constitutional Base for Extending AFDC Benefits to Families with Unborn Children," 48 So. Calif. L. Rev. 121, 144-55 (1974).

ADDENDUM A

1380

Ruth PARKS, Individually and for all others similarly situated, Plaintiff-Appellant,

v.

Richard HARDEN, Individually and as the Commissioner of the Department of Human Resources, Defendant-Appellee.

Mrs. Alice L. HARRIS and Mrs. Mary E. Hood, Individually, on behalf of their unborn children, and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

MISSISSIPPI STATE DEPARTMENT OF PUBLIC WELFARE et al., etc., Defendants-Appellants.

Nos. 73-1855 and 73-3220.

United States Court of Appeals, Fifth Circuit.

Dec. 2, 1974.

Class actions were brought raising the issue whether unborn children were eligible individuals under the aid to families with dependent children program. The United States District Court for the Northern District of Georgia, at Atlanta, Sidney O. Smith, Jr., J., 354 F.Supp. 620, held that unborn children were not eligible. The United States District Court for the Northern District of Mississippi at Aberdeen, Orma R. Smith, J., 363 F.Supp. 1293, held that unborn children were eligible and appeals were taken. The Court of Appeals, Wisdom, Circuit Judge, held that unborn children are eligible individuals under the Social Security Act, and states' denial of AFDC benefits to expectant mothers strictly on the basis of the fetal status of their children contravenes the Act and is violative of the supremacy clause.

Judgment in first action reversed and judgment in second action affirmed.

Ainsworth, Circuit Judge, filed dissenting opinion.

1. Social Security and Public Welfare ⇐194

An unborn child's lack of status as a "person" for Fourteenth Amendment purposes does not affect the status of an unborn child as a "child" within language of the Social Security Act. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.; U.S.C.A.Const. Amend. 14.

2. Civil Rights ⇐13.6
Social Security and Public Welfare ⇐194

Rights of the mother to AFDC benefits are not derivative but direct and mother has standing to assert those rights in civil rights action. 42 U.S.C.A. § 1983; Social Security Act, § 406(b)(1), 42 U.S.C.A. § 606(b)(1).

3. Courts ⇐406.9(9)

Class actions involving federal-state aid to mothers of unborn children would not be remanded for convocation of a three-judge court where constitutional claim was not raised in one action and was not considered in the other and Court of Appeals resolved controversy on statutory basis. 42 U.S.C.A. § 1983; Social Security Act, § 406(b)(1), 42 U.S.C.A. § 606(b)(1); 28 U.S.C.A. §§ 1253, 1292(a)(1), 2281.

4. Social Security and Public Welfare ⇐5

State may not deny benefits to an entire class of individuals eligible under the Social Security Act. Social Security Act, §§ 402(a)(10), 406(a), 42 U.S.C.A. §§ 602(a)(10), 606(a).

5. States ⇐4.12

State regulations contrary to provisions of Social Security Act are invalid under the supremacy clause. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.; U.S.C.A.Const. art. 6, cl. 2.

6. Social Security and Public Welfare ⇐194

Federal rather than state standards determine eligibility under the joint federal and state aid to families with dependent children program. Social Security Act, § 406(a), 42 U.S.C.A. § 606(a).

7. Social Security and Public Welfare ⇐2

Social Security Act is not so elastic that HEW can stretch its language to cover individuals not intended by Congress to be eligible. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.

8. Social Security and Public Welfare ⇐194

HEW did not act ultra vires in permitting AFDC benefits to be paid to expectant mothers. 42 U.S.C.A. § 1983; Social Security Act, § 401, 42 U.S.C.A. § 601.

9. Social Security and Public Welfare ⇐194
States ⇐4.12

Unborn children are eligible individuals under the joint federal and state aid to families with dependent children program, and states' practices of denying AFDC benefits to expectant mothers strictly on the basis of the fetal status of their children contravenes the act and is therefore violative of the supremacy clause. Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.; U.S.C.A.Const. art. 6, cl. 2.

Appeal from the United States District Court for the Northern District of Georgia.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

WISDOM, Circuit Judge:

These two class actions involving federal-state aid to mothers of unborn children require this Court to consider for the first time issues litigated in a number of other federal courts

during the past two years: Does the failure of a state to provide benefits to mothers of unborn children under the joint federal and state Aid to Families with Dependent Children (AFDC) program contravene provisions of the Social Security Act? Does the Act deny to unborn children or their mothers the equal protection of the laws? The plaintiffs[1] would, of course, have us answer in the affirmative. They cite a series of decisions by the United States Supreme Court,[2] as well as the language of the Act itself, to demonstrate that unborn children are eligible individuals under the Act, and that to fail to provide benefits to them in the face of such statutory eligibility violates the Supremacy Clause. Straining at the traces imposed by Roe v. Wade, 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, Plaintiff Parks also urges that the denial of AFDC benefits to unborn children simply on the basis of their fetal status denies them the equal protection of the laws, or, at minimum, violates the right to equal protection of the plaintiff mothers.

The Attorneys General of Georgia and Mississippi, defendants in the two actions, respond in kind: there is nothing either in the language of the Social Security Act or its legislative history to indicate a Congressional intent to include unborn children in the AFDC program. Although the Department of Health, Education and Welfare (HEW) *permits* a state to make AFDC payments to expectant mothers, they argue, such benefits are clearly optional. In dismissing the constitutional argument, the State of Georgia cites Roe v. Wade and concludes that since an unborn child is not a person within the meaning of the Fourteenth Amendment, "the State has created no classification which is subject to judicial scrutiny."

1. In Parks v. Harden the class action plaintiff appealed; in Harris v. Mississippi the State Department of Public Welfare appealed.

2. King v. Smith, 1968, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118; Townsend v. Swank, 1971, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448; Carleson v. Remillard, 1972, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352.

In these two cases the district courts reached opposite conclusions. In Parks v. Harden, the District Court for the Northern District of Georgia, concluding that an unborn child simply was not a child within the meaning of the Act, dismissed the cause of action and dissolved the temporary restraining order it had entered orally pending its decision on the merits.[3] 354 F.Supp. 620. On the other hand, the District Court for the Northern District of Mississippi held that unborn children were "eligible individuals" under the Act, and that Mississippi could not, therefore, deny them AFDC benefits. 363 F.Supp. 1293. Concurring as we do with the latter reading of the applicable law, we affirm the judgment in No. 73–3220, Harris v. Mississippi State Department of Public Welfare, and reverse the judgment in No. 73–1855, Parks v. Harden.

I.

Before we address the substantive issues raised by these appeals, we consider several questions, "jurisdictional" in a broad sense, which are not directly raised by the parties here, but have concerned other district or circuit courts confronting the same issue we address today.[4] The first is an outgrowth

3. Although the constitutional questions outlined in the text are raised on appeal, they were not considered by the district court, since the parties stipulated their insubstantiality.

4. More than two dozen courts have considered the problem in one form or another. Four Courts of Appeals have addressed the issue on the merits; all have reached the result we reach: Carver v. Hooker, 1 Cir. 1974, 501 F.2d 1244, [No. 74–1079]; Wilson v. Weaver, 7 Cir. 1974, 499 F.2d 155, [No. 73–1541]; Alcala v. Burns, 8 Cir. 1974, 494 F.2d 743, petition for cert. filed, 42 U.S.L.W. 3642 (May 15, 1974) [No. 73–1708]; Doe v. Lukhard, 4 Cir. 1974, 493 F.2d 54, petition for cert. filed, 42 U.S.L.W. 3667 (May 24, 1974) [No. 73–1763]. The Third Circuit Court of Appeals has also entertained an appeal on the issue, but vacated and remanded the case for convocation of a three-judge court and did not reach the merits. Murrow v. Clifford, 3 Cir. 1974, 502 F.2d 1006.

In addition to the two district court decisions on appeal here, Harris v. Mississippi State Department of Public Welfare, N.D.Miss. 1973, 363 F.Supp. 1293, and Parks v. Harden, N.D.Ga.1973, 354 F.Supp. 620, at least eighteen other district courts have considered

of the holding in Roe v. Wade that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729, 35 L.Ed.2d at 180. Since we conclude that the plaintiffs are entitled to AFDC benefits under the Social Security Act, we need not reach the equal protection argument advanced by Parks on appeal. Yet *Roe*'s denial of fetal personhood nonetheless must be taken into account.

[1] An unborn child's lack of status as a "person" for Fourteenth Amendment purposes does not affect the status of an unborn child as a "child" within the language of the Act;[5]

the issue of AFDC and to unborn children on the merits. Four reached the conclusion arrived at in Parks v. Harden and denied AFDC benefits to the unborn. Murrow v. Clifford, D.N.J. [Civ. Act.No. 114-73] (June 12, 1973) (letter memorandum), vacated and remanded, 502 F.2d 1406 (3 Cir. 1974); Mixon v. Keller, M.D.Fla. 1974, 372 F.Supp. 51; Poole v. Endsley, N.D.Fla.1974, 371 F.Supp. 1379; Geisler v. Endsley, N.D.Fla. [No. 74-3] (March 4, 1974).

The other fourteen district court decisions we have found have all held that states taking part in the AFDC program must provide benefits to mothers of unborn children. Tapia v. Vowell, S.D.Tex. [Civ.Act.No. 73-B-169] (November 11, 1973); Tillman v. Endsley, S.D.Fla. [No. 73-1476-Civ.-CF] (March 11, 1974); Jones v. Graham, D.Neb. [CV 73-L-235] (September 5, 1973); Morris v. Houston, W.D.Mich. [No. G250-73 Ca-5] (October 29, 1973) (temporary restraining order granted); Taylor v. Hill, W.D.N.C., 377 F.Supp. 495 (1974); Turner v. Shulims, W.D.Mo. [Civ.Act.No. 14CV 311-w-3] (, 1974) (preliminary injunction granted); Wisdom v. Norton, D.Conn.1974, 372 F.Supp. 1190; Carver v. Hooker, D.N.H.1973, 369 F.Supp. 204, aff'd, 501 F.2d 1244 [No. 74-1079] (1974); Whitfield v. Minter, D.Mass.1973, 368 F.Supp. 798; Stuart v. Canary, N.D.Ohio 1973, 367 F.Supp. 1343; Green v. Stanton, N.D.Ind.1973, 364 F.Supp. 123, aff'd, 499 F.2d 155 (7 Cir. 1974); Doe v. Lukhard, E.D.Va.1973, 363 F.Supp. 823, aff'd, 1974, 493 F.2d 54, petition for cert. filed, 42 U.S.L.W. 3067 (May 24, 1974) [No. 73-1763]; Alcala v. Burns, S.D.Iowa 1973, 362 F.Supp. 180, aff'd 1974, 494 F.2d 743, petition for cert. filed, 42 U.S.L.W. 3642 (May 15, 1974) [No. 73-1708]; Wilson v. Weaver, N.D.Ill 1972, 358 F.Supp. 1147, aff'd, 7 Cir. 1974, 499 F.2d 155 [No. 73-1541].

5. In an effort to prevent confusion, we shall refer to a child still carried by its mother as a "fetus" or and "unborn child". Children already born will be called just that, "born children" or "postpartum children". We intimate no opinion on the sensitive medical, theological, and philosophical questions involved in the debate over when life begins.

that a fetus is not constitutionally *entitled* as a person to claim certain benefits in no way affects the right or power of Congress to *extend* benefits to unborn children by appropriate legislation. The question for resolution here is whether Congress did so. See Carver v. Hooker, D.N.H.1973, 369 F.Supp. 204, 210 n. 23, aff'd 1974, 501 F.2d 1244 [No. 74–1079]; Alcala v. Burns, S.D.Iowa 1973, 362 F.Supp. 180, 186, aff'd, 1974, 494 F.2d 743, petition for cert. filed, 42 U.S.L.W. 3642 (U.S. May 15, 1974) [No. 73–1708]. Yet, at first blush, *Roe* might be thought to preclude even the statutory claim advanced by the plaintiffs under 42 U.S.C. § 1983, since Section 1983 requires that the "rights, privileges or immunities" of a "citizen of the United States or other *person* within the jurisdiction thereof" be abridged before there is a basis of liability for the deprivation. [Emphasis added].[6]

Reading the quoted passage from *Roe* together with the language cited above, at least one district court has concluded that "if an unborn is not a person under the Fourteenth Amendment[,] an unborn has no right of action under Section 1983 and [the] claim must fall." Poole v. Endsley, N.D.Fla. 1974, 371 F.Supp. 1379, 1382. Whatever the merits of extending *Roe*'s reach to Section 1983 actions, it is not necessary to reach that question here, for it is the rights of the expectant mother, rather than those of the fetus, which are at issue. Alcala v. Burns, 362 F.Supp. at 186.

The references to the AFDC program in the history of the Act make it clear that the Congressional objective is to furnish aid to needy mothers. Originally known as "Aid to Dependent Children", 49 Stat. 627, the program's name was altered by a 1962 Social Security Act amendment to "Aid and

6. Section 1983 provides:
Every person who, under color of any statute, ordinance, regulation custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

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Services to Needy Families with Children". Pub.L. 87–543, 42 U.S.C. § 601 (1970); see King v. Smith, 1968, 392 U.S. 309, 311 n. 1, 88 S.Ct. 2128, 2130, 20 L.Ed.2d 1118, 1122. And, currently, Part A of Title IV of the Act, which erects the AFDC structure and procedures, simply denominates its subject as "Aid to Families with Dependent Children". 42 U.S.C. § 601. One district court has evaded the clear import of this language, although in a constitutional rather than statutory context, by holding that the mother's rights under the AFDC program "are incidental to, and derived from, the statutory benefits conferred upon the children." Since the unborn child is not a person, the court reasoned, no benefits can be derived on its behalf by its mother, Murrow v. Clifford, D.N.J. [Civ. Act No. 114–74] (letter memorandum, June 12, 1973, at 3), vacated and remanded for assignment to a three-judge court, 502 F.2d 1066 (3 Cir. 1974). Thus, the court concluded, Roe v. Wade precludes even the mother's benefits on equal protection grounds.

[2] We do not find such reasoning persuasive, nor do we believe that Roe v. Wade can be used to support the view that the mother of an unborn child should be denied a cause of action under Section 1983. The definition in the Act of "aid to families with dependent children" makes it evident that Congress contemplated payments of AFDC benefits directly to the relative with whom a dependent child is living, to meet the relative's own needs:

> The term "aid to families with dependent children" means money payments *with respect* to . . . . a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law *to meet the needs of the relative with whom any dependent child is living* . . . .

42 U.S.C. § 606(b)(1) [emphasis added]. Under this language the rights of the mother are not derivative but direct. Although it is necessary for a relative to have an eligible dependent child living in the home for the relative to acquire

eligibility, the existence of such a condition precedent cannot render the relative's rights "incidental" in the face of statutory language to the contrary. If AFDC payments must be made with respect to unborn as well as postpartum children, then, the expectant mother herself has a right to receive them and standing to assert that right under Section 1983. See Carver v. Hooker, 369 F.Supp. at 210; Murrow v. Clifford, 3 Cir. 1974, 502 F.2d 1066.

The second jurisdictional difficulty is raised by the Third Circuit's treatment of Murrow v. Clifford, the only case other than Parks v. Harden in which a Court of Appeals has been presented with a determination that expectant mothers are *not* entitled to AFDC benefits under the Act. In *Murrow*, the class action plaintiffs brought their action for declaratory and injunctive relief on statutory and constitutional grounds, alleging first, that New Jersey's failure to authorize AFDC benefits with respect to unborn children conflicted with the Social Security Act and was therefore invalid under the Supremacy Clause, and second, that the state's refusal to provide the payments violated the mother's rights to the equal protection of the laws. Finding the Supremacy Clause claim to be without merit, the single district judge went on to adjudicate the equal protection claim, and again found against the plaintiffs. On appeal, the Third Circuit vacated the judgment and remanded the case, holding that the plaintiffs' constitutionally-grounded request for an injunction against a state regulation of statewide application could be considered only by a three-judge district court, and could be appealed only to the United States Supreme Court. See 28 U.S.C. §§ 2281, 1253.

The court also remanded the statutory Supremacy Clause claim,[7] because the interests of "sound judicial administration"

7. In referring to the plaintiffs' contention that the challenged state policies are inconsistent with the Social Security Act and therefore invalid under the Supremacy Clause, we use the terms "statutory" or "Supremacy Clause" contention to differentiate it from the equal protection contention. In doing so, we do not mean to suggest that

dictated that it, too, be considered by the three-judge court. Although it had jurisdiction over the appeal from the district court's disposition of the statutory question,[8] the Court of Appeals reasoned, its decision affirming the district court would preclude consideration of the Supremacy Clause issue by the three-judge court, and compel it to decide the case on constitutional grounds. Such a result would contravene the Supreme Court's clearly enunciated policy that, where possible, courts should resolve controversies on nonconstitutional grounds. E. g., Rosado v. Wyman, 1970, 397 U.S. 397, 402, 90 S.Ct. 1207, 1212, 25 L.Ed.2d 442, 450; Hagans v. Lavine, 1974, 415 U.S. 528, 547, 94 S.Ct. 1372, 1384, 39 L.Ed.2d 577, 594. Thus, the court concluded, a remand to the district court with directions to convene a three-judge panel was the only disposition consonant with sound judicial policy.

Yet because its decision was bottomed on considerations of judicial administration, the court of appeals limited its holding in *Murrow* so as not to include cases involving coincident statutory and constitutional claims in which the district court found the statutory claim to be meritorious:

> [I]t is improper for a single district judge to decide a supremacy clause claim *against the claimant* when it is pendent to a constitutional claim which must be decided by a three-judge district court. If he is not going to sustain the supremacy claim he should request the convening of a three-judge court and permit that court to pass upon the entire case.

502 F.2d at 1070 [emphasis added]. The rationale of this distinction is not complex. Should the district court hold *in*

it is not constitutionally grounded. See Hagans v. Lavine, 1974, 415 U.S. 528, 533, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577, 585-586.

8. The court viewed the statutory determination as an interlocutory appeal from the denial of an injunction and asserted it had jurisdiction under 28 U.S.C. § 1292(a)(1). The Fourth Circuit has suggested a similar approach, at least where the district court certified the interlocutory matter, Doe v. Lukhard, supra note 4, 493 F.2d at 59 n. 6.

favor of the claimants on statutory grounds, the judgment may be appealed and affirmed on that basis, avoiding decision on the constitutional issue and, hence, the need for a three-judge court. A ruling *adverse* to the plaintiffs on the statutory ground by the single district judge, however, insures that the three-judge court which must be convened to consider the constitutional contention will be bound by the single judge's decision on the statutory issue and will be forced to reach and decide the constitutional claim. Thus, in order to preserve the three-judge court's flexibility to reach a nonconstitutional result, a single district judge inclined to rule against the claimants ought not to rule at all. Much the same reasoning appears in dictum in a recent decision of the Fourth Circuit Court of Appeals, Doe v. Lukhard, 4 Cir. 1974, 493 F.2d 54, 59–60, petition for cert. filed, 42 U.S.L.W. 3667 (U.S. May 24, 1974) [No. 73–1708]. Although the court there upheld on statutory grounds the district court's grant of AFDC benefits to unborn children, it intimated that the entire controversy, in both its constitutional and statutory incarnations, would better have been referred to a three-court initially.[9] What we must decide, then, is whether the interests of "sound judicial administration" require a remand of either of the cases on appeal here.

We do believe that the *Murrow-Doe* reasoning is not applicable to our controversy, and decline to follow it. This conclusion is a function of the strikingly different posture of the cases before us on appeal, since neither district court here reached any constitutional issue which could have required adjudication by a three-judge court. Thus we need not rest our affirmance of *Harris* or our reversal of *Parks* on constitutional grounds. In *Murrow*, the district court had reached and

9. The Fourth Circuit's admonition is a bit broader than the Third Circuit's, perhaps because only the latter court had the benefit of the Supreme Court's reaffirmation in Hagans v. Lavine, supra note 7, of the court's traditionally "constructive view of the three-judge court jurisdiction". 415 U.S. at 544, 94 S.Ct. at 1382, 39 L.Ed.2d at 591.

decided the plaintiff's request to enjoin a state practice on the basis of a constitutional contention which it was clearly without power to reach. In this setting, remand and convocation of a three-judge court were believed to be mandatory by the court of appeals majority, for consideration of the constitutional issue, if no other. To move from this position to one holding that the three-judge court ought to be able to decide both the statutory and constitutional claims was a very short step for the court.

[3] Our cases present a far different situation, however. In *Harris*, the plaintiffs advanced no constitutional challenge at all, and in *Parks*, the parties considered the equal protection contention to be insubstantial for purposes of requiring a three-judge court. Although this conclusion is questionable in light of our holding that the rights involved here are those of the expectant mother rather than the unborn child, and the liberal substantiality test set out in Goosby v. Osser, 1973, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 and Hagans v. Lavine, supra,[10] it did insure that the constitutional claim was not

10. As the Court explained in *Goosby*:

Title 28 U.S.C. § 2281 [28 U.S.C.S. § 2281] does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," Bailey v. Patterson, 369 U.S., [31] at 33, [82 S.Ct. 549, at 551] 7 L.Ed.2d 512; "wholly insubstantial," ibid.; "obviously frivolous," Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910); and "obviously without merit," Ex parte Poresky, 290 U.S. 30, 32, 54 S.Ct. 3, 4-5, 78 L.Ed. 152 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281 [28 U.S.C.S. § 2281]. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Ex parte Poresky, supra, at 32, [54 S.Ct. 3 at 4], 78 L.Ed. 152, quoting from Hannis Distilling Co.

considered by the district court. Since we reverse the district court's statutory decision and find for the plaintiffs without reaching the constitutional question, no claim requiring adjudication by a three-judge court, and direct appellate review by the Supreme Court need be decided. Accordingly, no remand is in order.

Moreover, remand for convocation of a three-judge court here would in no way serve the interests of sound judicial administration which so concerned the *Murrow* majority. Only *Parks* involved a constitutional question and only *Parks* could be remanded, since *Harris*, which involved no constitutional issue, is plainly properly here on appeal. Thus it is our duty to decide it. To remand *Parks* with directions to request the convening of a three-judge court, while affirming *Harris*, would place us in the anomalous position of ordering that a three-judge court be convened to consider the constitutional issue in the face of binding precedent that the controversy can be resolved on a statutory basis. Such a result would pervert the intent of the three-judge court statutes and flout the very values *Murrow* espouses.

II.

We now turn to the merits of the controversy, and necessarily, to the AFDC program itself. AFDC originated as "Aid to Dependent Children", one of three major categorical assistance plans provided for by the Social Security Act of 1935.[11] Although administered by each participating state, the program is largely financed by the federal government, on a

v. Baltimore, supra, 216 U.S. at 288, [30 S.Ct. 326, at 327], 54 L.Ed. 482; see also Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105–106, 53 S.Ct. 549, 550, 77 L.Ed. 1062 (1933); McGilvra v. Ross, 215 U.S. 70, 80, 30 S.Ct. 27, 31, 54 L.Ed. 95 (1909).

11. Today there are four. In addition to the AFDC, HEW administers Old Age Assistance (42 U.S.C. §§ 301–306), Aid to the Blind (42 U.S.C. §§ 1201–1206), and Aid for the Permanently and Totally Disabled (42 U.S.C. §§ 1351–1355). See Rosado v. Wyman, 1970, 397 U.S. 397, 408 n. 10, 90 S.Ct. 1207, 1215, 25 L.Ed.2d 442, 453.

matching fund basis. State participation in the program is essentially voluntary, but states which do elect to take part are required to submit an AFDC plan to HEW, for approval by the Secretary. So long as the state plans meet the requirements of the Act, the states have considerable latitude in setting the "standard of need" to be employed in determining eligibility for benefits, and the level of benefits paid to eligible individuals. Thus state-mandated dollar ceilings, percentage reductions in benefits, and similar elements are permissible under the Act and under HEW guidelines.[12] See, e. g., Hagans v. Lavine, 415 U.S. at 530, 94 S.Ct. at 1375–1376 n. 1, 39 L.Ed.2d at 583–584; Rosado v. Wyman, 397 U.S. at 407–408, 90 S.Ct. at 1215–1216, 25 L.Ed.2d at 453.

[4] What a state may not do however, is to deny benefits to an entire class of individuals eligible under the Act. See 42 U.S.C. § 602(a)(10); King v. Smith, 392 U.S. at 333, 88 S.Ct. at 2141, 20 L.Ed.2d at 1134. Yet this is precisely the deprivation alleged by each of the plaintiffs in her complaint before the district court. Both Harris and Parks argue on behalf of their respective classes that an unborn child is a "dependent child" within the meaning of Section 406(a) of the Act (42 U.S.C. § 606(a)), and that expectant mothers are therefore "eligible" individuals who may not be denied benefits under the Act. The states, citing HEW regulations, rejoin that although federal monies are made available for the payment of AFDC benefits with respect to unborn children, the unborn child aspect of the program is not a requirement but an option, enforceable only in those nineteen jurisdictions which have elected to exercise it. To resolve the controversy we look first to the Act itself, and then to three Supreme Court decisions for aid to our statutory reading.

12. The history and structure of the AFDC program have been summarized elsewhere. See, e. g., Hagans v. Lavine, supra note 7; Rosado v. Wyman, supra note 11; King v. Smith, supra note 2.

[5, 6] There are two key sections to which the plaintiffs pinion their arguments. The first, Section 402(a)(10) of the Act, 42 U.S.C. § 602(a)(10) provides:

> a) A State plan for aid and services to needy families with children *must* . . .
>
> . . . . . .
>
> (10) *provide*, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and *that aid to families* with dependent children shall be furnished *with reasonable promptness to all eligible individuals.*

Failure to comply with this section of the Act will render a state ineligible to participate in the program, thus barring it from the receipt of matching federal funds. See 42 U.S.C. § 604(a). Moreover, state regulations contrary to the Act's provision are invalid under the Supremacy Clause.[13] Wisdom v. Norton, D.Conn.1974, 372 F.Supp. 1190, 1192. It is apparent then, that if unborn children or their mothers are "eligible individuals" within this section, a participating state may not deny them AFDC benefits. To determine the eligibility of the unborn and their mothers, however, we again look to the Act, since it is undisputed that federal, rather than state standards determine eligibility. See, e. g., King v. Smith, 392 U.S. at 317, 88 S.Ct. 2128; Lopez v. Vowell, 5 Cir. 1973, 471 F.2d 690, 693. Since payments are authorized only with respect to "needy dependent children and the parents or relatives with whom they are living," 42 U.S.C. § 601, this translates into an

13. Article VI, Clause 2, of the Constitution provides:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

inquiry whether an unborn child is a "dependent child" for AFDC purposes.

On its face, however, the Act does not appear to be helpful. Section 406(a) provides:

> When used in this part—
>
> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

One district court has read this language as "clear on its face" and held that it excludes fetuses.[14] Like most courts which have considered the section,[15] we do not believe this definition resolves the issue. A "fetus" *could* of course be "needy", could be deprived of parental—or more specifically, paternal—support, and is obviously "under the age of eighteen." Unfortunately, as all parties here admit, the legislative history is opaque. No Congressional intent to include or exclude the unborn is apparent.[16] Lacking legislative guidance, the par-

14. Mixon v. Keller, supra note 4, 372 F.Supp. at 51, 54.

15. See, e. g., Alcala v. Burns, supra note 4, 362 F.Supp. at 184; Carver v. Hooker, supra note 4, 369 F.Supp. at 212.

16. Although in the course of debate on the original Act at least one representative made an oblique reference to the desirability of protecting children "from the time of birth", we agree with Chief Judge Coffin, writing for the First Circuit, that there is no evidence

ties here turn to their dictionaries, citing contrary definitions of "child" and the axiom of statutory construction that words should be given their commonly understood meaning." Yet such arguments only reinforce the conviction that the term "child" can be defined either to include or to exclude the unborn. Conceding a dearth of guidance from legislative history, logic, or lexicon, the defendants would have us deny AFDC benefits to these plaintiffs, because we can discern no congressional intent to *include* them. The Supreme Court, however, has delineated a different test for construing the AFDC provisions, and in applying it, we conclude that the plaintiff must prevail.

III.

A proper vantage for viewing the contentions here can only be had from atop a tripod of Supreme Court decisions: King v. Smith, 1968, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118; Townsend v. Swank, 1971, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 and Carleson v. Remillard, 1972, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352. In each of these cases, a state attempt to limit or preclude the payment of benefits to an individual otherwise eligible under the Social Security Act, was struck down as inconsistent with the Act's provisions, and hence invalid under the Supremacy Clause. In *King*, the

to suggest that Congress as a whole enacted the legislation with any such intent. Carver v. Hooker, 1 Cir. 1974, 501 F.2d 1244 [No. 74–1079], quoting 79 Cong.Rec. 7839 (1935) (Statement of Mr. Ellenhogen).

17. Thus Parks cites Webster's Seventh New Collegiate Dictionary which gives as the first definition of "child", "an unborn or recently born human being". The State of Georgia in its brief insists that it is the second definition of "child" in Webster's New International Dictionary, Second Edition, which is appropriate:

"(2) a young person of either sex . . . . ." And, at oral argument, the Attorney General of Mississippi cited yet another "old dictionary" in his office as defining "child" in a manner so as to exclude fetuses. Such a definitional duel proves nothing, of course, save that either side can find some support for its position in "common usage."

Court invalidated an Alabama regulation which denied AFDC benefits to otherwise eligible dependent children whose mothers "cohabited" with any able-bodied man. Such a policy, the Court held, is in conflict with 42 U.S.C. § 606(a). In *Townsend* an Illinois plan denying benefits to needy children eighteen to twenty-one years of age who attended college, but granting funds to children of the same age attending high school or vocational school, was struck down as violative of Section 406(a)(2)(B) of the Act. 42 U.S.C. § 606(a)(2)(B). In *Carleson*, the last leg of the tripod, the Supreme Court held that California's attempt to deny AFDC benefits to "military enlistees" under the "continued absence from the home" provision of 42 U.S.C. § 602(a) was in conflict with that section and consequently invalid.

More important than the individual state regulations struck down, however, is the common rationale running through all three cases, a principle of construction for the AFDC provisions which has become known as the *King-Townsend* test:

> Thus, King v. Smith establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance, under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. We recognize that HEW regulations seem to imply that States may to some extent vary eligibility requirements from federal standards. However, the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished "to *all eligible* individuals."

Townsend v. Swank, 404 U.S. at 286, 92 S.Ct. at 505 (footnotes omitted) (emphasis in Townsend). The Supreme Court has, therefore, established a two-step standard by which any state exclusion may be judged. First, looking to the Act

itself, we must decide whether the statutory language furnishes a basis for eligibility. Second, if facial eligibility is established, we must examine the statute itself and plumb its legislative history, to determine whether Congress intended to exclude the class to which the state would deny benefits. If no Congressional authorization for exclusion can be found, the state standard is in conflict with the Act, and is invalid under the Supremacy Clause. We do not understand the defendants here to argue that the statute or its legislative history evidences any Congressional intent to exclude the unborn. Our research has disclosed none." Thus the single issue for resolution may be simply put: Is an unborn child an "eligible individual" under the Social Security Act?

Answering this question might at first be thought to return to our earlier definitional dilemma. We need not re-address that conundrum ever, since HEW itself, through one of its regulations permits payments of AFDC benefits to expectant mothers "with respect to an unborn child when the fact of pregnancy has been established by medical diagnosis." [19] 45

18. See note 16.

19. Section 233.90(c)(2) provides:

(2) Federal financial participation is available in:

(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC;

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC; and

(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency situations that deprive the child of the care of the relative through whom he has been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

(3) Federal financial participation (at the 50 percent rate) is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of incapacity of a parent or

CFR § 233-90(c)(2)(ii). Such payments have been authorized since at least 1946 when the Public Assistance Administration, HEW's predecessor agency, altered its "Handbook" to permit Wisconsin to secure matching funds for AFDC payments to expectant mothers. Handbook of Public Assistance Administration, Part IV, Section 3412 (1946).[20] The plaintiffs argue that the impact of such a regulation is obvious. By authorizing payment of AFDC funds to expectant mothers with respect to their unborn children, HEW has necessarily, if tacitly, recognized that an "unborn child" is a "dependent child" within the Act, and hence "eligible" under federal standards for AFDC benefits. When read in light of the "venerable principle" that great weight should be given the construction of a statute by those charged with its administration, Red Lion Broadcasting Co. v. F.C.C., 1969, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371, 384, the plaintiffs conclude, the HEW regulation resolves the "eligibility" portion of the King-Townsend test in favor of the plaintiffs.

The defendants, and HEW itself,[21] however, resist this reading of the regulation and its impact on the statute. They contend, in an argument found persuasive by the District Court in Parks v. Harden, 354 F.Supp. at 623, that there is a distinction in the regulations themselves, which makes § 233.-90(c)(2)(ii) clearly optional. Section 233.90(c) entitled "Federal Financial Participation" is divided into two subjects. The first, Section 233.90(c)(i), discusses various terms which appear in section 406(a) of the Act, 42 U.S.C. § 606(a). Although the HEW brief is less than clear on the point, at least Georgia concedes that any state plan which sought to alter these

pregnancy of a mother. [36 FR 3868, Feb. 27, 1971; 38 FR 26916, Sept. 27, 1973].

20. A more detailed discussion of the origin of the authorization of payments with respect to the unborn may be found in Doe v. Lukhard, supra note 4, 363 F.Supp. at 829.

21. HEW's views were expressed in an amicus brief submitted to the district court in Wilson v. Weaver, supra note 4, and adopted in a letter to this panel.

"interpretations" of § 406(a)'s standards for eligibility would be invalid. See Parks v. Harden, 354 F.Supp. at 623. Section 233.90(c)(2), however, in the words of the brief for the State of Georgia contains "optional provision[s] . . . which also permit payment to persons *not otherwise eligible under the AFDC program*[s] for purposes which HEW has determined to be compatible with the overall purposes of the Social Security Act." (Emphasis in brief). Thus through Section 290.-33(c)(2)(ii), HEW extends AFDC benefits to unborn children and expectant mothers at the option of each state despite the fact that they are ineligible under the Act. Bolstering this assertion of non-eligibility, the defendants stress that it is in Title V of the Act, 42 U.S.C. §§ 701–715 which deals with maternal and child health, rather than in Title IV, Part A, 42 U.S.C. §§ 601–610, the AFDC provision, that Congress expressed its concern for proper prenatal and infant care. Since expectant mothers and unborn children are provided for in Title V, they argue, they are not included in Title IV. Moreover, many of the AFDC provisions in the Act only make sense if applied to postpartum children.[22] Thus, they conclude, neither a fair reading of the Act nor of the HEW regulations can prompt fetal eligibility, so the search for a congressional "intent to exclude" mandated by *King-Townsend*, and Carleson need never be undertaken.

[7] We are compelled to disagree. To answer the last contentions first, it scarcely need be said that the attention Congress has given to mothers and children in Title V of the Act necessarily shows no purpose to ignore them in Title IV. Moreover, the fact that certain of the Act's provisions can sensibly be applied only to a child who is born does not necessarily exclude the unborn from the Act's ambit. And, most importantly, HEW's contention that its regulation authorizes optional payment to "technically ineligible" recipients cannot withstand close scrutiny. Either unborn children are eligible or they are not. If they are eligible, HEW has acted

22. See, e. g., 42 U.S.C. §§ 602(a)(7), (8), (11), (13), (15), (16).

properly in permitting payments with respect to the unborn and under the *King-Townsend* standard no state may declare expectant mothers and their fetuses ineligible. If this class is *in*eligible, however, then HEW has no power to *allow* the benefits, and in doing so, it has acted *ultra vires*. This is the difficulty with the defendants' reading of the Act and regulation. The Act may not be rigid, but it is *not* so elastic that HEW can stretch its language to cover individuals not intended by Congress to be eligible.

We hold that HEW has recognized that the unborn are eligible and that such a determination is a reasonable construction of the Act. This is so for several reasons. First, payments to expectant mothers are consistent with the purposes of the Act to encourage[]

> the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . .

42 U.S.C. § 601. It cannot be doubted that proper prenatal care is vital to the physical and mental health of the child, and an unborn child deprived of such care may reasonably be said to be as "needy" and "dependent" as a child born into similar circumstances.[23] Moreover, Congress appears to have recognized the status of the fetus as at least apparently eligible for benefits. During the second session of the Ninety-Second Congress, resolutions were introduced in both Houses proposing that the AFDC provisions of the Act be amended so as to

23. Several district courts agree. E. g., Green v. Stanton, supra note 4, 364 F.Supp. at 126; Stuart v. Canary, 367 F.Supp. at 1346; Parks v. Harden, 364 F.Supp. at 622, 626.

specifically exclude the unborn. See H.R.Rep. No. 92-231, 92nd Cong., 2d Sess. 184 (1972); S.Rep. No. 92-1230, 92nd Cong. Sess. 108 (1972), U.S.Code Cong. & Admin.News, p. 4989. Both resolutions were defeated. Although some courts have read the rejection of these amendments as sanctioning the current HEW practice of making benefits to expectant mothers optional,[24] we, like our First Circuit brothers, believe that Congressional consideration of these measures at minimum establishes its belief that unborn children are currently eligible under the Act "and that only by amending its language can their status as eligible individuals be altered."[25] See Carver v. Hooker, 501 F.2d 1244; Wilson v. Weaver, 358 F.Supp. at 1155.

Finally, our conviction that the Act's purpose and recent legislative history establish fetal eligibility is not undercut by our obligation to defer to the construction given the Act by HEW, the agency charged with its administration. Although HEW interprets the Act as allowing "optional" payments with respect to the unborn, "the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished 'to all eligible individuals'." (Emphasis by the Court in *Townsend*.) Townsend v. Swank, 404 U.S. at 286, 92 S.Ct. at 505, 30 L.Ed.2d at 453.

[8, 9] In sum, then, we conclude that the *King-Townsend* test must be applied, as the court properly did in *Harris*, and failed to do in *Parks*. Since we do not believe that HEW acted *ultra vires* in permitting AFDC benefits to be paid to expectant mothers, we hold that unborn children are eligible individuals under the Act as HEW's payment of funds in their behalf recognizes. 45 C.F.R. § 233.90(c)(2)(ii). This clears the

24. See, e. g., Mixon v. Keller, supra note 4, 372 F.Supp. at 55; Whitfield v. Minter, 368 F.Supp. at 803.

25. See Stuart v. Canary, supra note 4, 367 F.Supp. at 1344; Wilson v. Weaver, 358 F.Supp. at 1155.

first hurdle of the *King-Townsend* standard and since it is patent that there is no evidence that Congress intended to exclude the unborn, the second is cleared as well. Thus, the practices of the states of Georgia and Mississippi denying AFDC benefit to expectant mothers strictly on the basis of the fetal status of their children contravenes the Social Security Act of 1935, and is therefore violative of the Supremacy Clause of the United States Constitution.

For these reasons, the judgment of the district court in No. 73–1855, Parks v. Harden, is reversed and that in No. 73–3220, Harris v. Mississippi is affirmed.

AINSWORTH, Circuit Judge (dissenting):

Regretfully, I must dissent though I am aware that the majority opinion follows the weight of authority in other circuits. The majority arrives at a socially attractive conclusion, but it is a conclusion which the Congress and state legislatures should more properly reach. In pursuing what seems just, the majority not only unduly legislates by judicial fiat but also encumbers state and federal governments with difficult and complex burdens.

Initially, I express my agreement with the majority's conclusion that Goosby v. Osser, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973), and Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 1381–1382, 39 L.Ed.2d 577 (1974), allowed the district court in *Parks* to exercise pendent jurisdiction over the statutory claim, related as it was to the equal protection issue. *See also* Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 1351 n. 1, 39 L.Ed.2d 662 (1974). It appears, however, that while the equal protection claim was not "wholly insubstantial," it had little prospect of ultimate success. *Cf.* Dandridge v. Williams, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). Though it cannot be said that the district court abused its discretion in recognizing and adjudicating the pendent statutory claim, as a matter of sound judicial policy courts might decline to hear matters the sole jurisdictional basis for which

is a constitutional claim of dubious merit. *Cf.* Hagans v. Lavine, supra, 415 U.S. at 550, 94 S.Ct. at 1386 (Powell, J., dissenting).[1]

In its discussion of the merits, the majority gives little deference to HEW's basis for and interpretation of its own regulation, 45 C.F.R. § 233.90(c)(2)(ii), by which the extension of AFDC payments to expectant mothers is made optional for states participating in the program. The majority concedes that the statutory terms themselves provide little interpretative assistance, and that the legislative history is even less helpful. In such circumstances, HEW's interpretation should

1. In its opinion, *ante* p. 1391, the majority opinion states that *Harris* is "plainly properly here on appeal." I am not as certain. Plaintiff asserted, and the district court accepted, jurisdiction based only on a statutory claim under the Social Security Act, urging that 42 U.S.C. § 1983 states a federal cause of action and that 28 U.S.C. § 1343 provides jurisdiction. Recent opinions indicate that the latter conclusion may be erroneous. As Judge Friendly has stated, "The Social Security Act is not an 'Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States,' 28 U.S.C. § 1343(3), so as to remove the jurisdictional amount requirement for the statutory claims." Aguayo v. Richardson, 2 Cir., 1973, 473 F.2d 1090, 1101, cert. denied, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974). For other holdings that sections 1343(3) and (4) do not confer federal courts with jurisdiction over statutory claims not involving personal liberties or civil rights, see Lopez v. Luginbill, 10 Cir., 1973, 483 F.2d 456, 488–489, cert. denied, 415 U.S. 927, 94 S.Ct. 1436, 39 L.Ed.2d 485 (1974); McCall v. Shapiro, 2 Cir., 1969, 416 F.2d 246, 249–250; *see also* Note, Federal Jurisdiction over Challenges to State Welfare Programs, 72 Colum.L.Rev. 1404, 1421–1428 (1972). Since less than $10,000 is in controversy, we likewise do not have federal question jurisdiction under 28 U.S.C. § 1331(a). The Supreme Court has acknowledged that the question whether a statutory claim under the Social Security Act can derive jurisdiction from section 1343 is as yet unresolved. Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974); *see* Rosado v. Wyman, 397 U.S. 397, 405 n. 7, 90 S.Ct. 1207, 1214 n. 7, 25 L.Ed.2d 442 (1970); *cf.* Doe v. Lukhard, 4 Cir., 1974, 493 F.2d 54, 56–57, petition for cert. filed, 42 U.S.L.W. 3667 (May 24, 1974) [No. 73-1763]. Thus, it is at least uncertain whether *Harris* is properly before us. In view of the majority's disposition of *Parks*, however, which is properly here, it is not necessary to decide this difficult but important jurisdictional issue. Nor is it necessary to dismiss *Harris*, for plaintiffs could

be given considerable deference. As the Supreme Court said of HEW regulations relating to the AFDC program,

> [HEW's construction] is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers.

Rosado v. Wyman, 397 U.S. 397, 415, 90 S.Ct. 1207, 1219, 25 L.Ed.2d 442 (1970). Moreover, HEW's position that grants to expectant mothers are not mandatory *has been consistent and unchallenged for some 30 years.* In such cases of long-standing construction of a statute by those charged with its administration, the agency's construction should be followed "unless there are compelling indications that it is wrong." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1969); *see* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972); Zemel v. Rusk, 381 U.S. 1, 11–12, 85 S.Ct. 1271, 1278, 14 L.Ed.2d 179 (1965); Udall v. Tallman, 380 U.S. 1, 16–18, 85 S.Ct. 792, 801-802, 13 L.Ed.2d 616 (1965). We have no compelling indications that HEW's position here is wrong.[2]

merely bring the same suit, appended to a colorable equal protection claim as in *Parks*, and prevail on the merits on the basis of *Parks*.

2. The majority recognizes that HEW's interpretation of the Social Security Act is due great deference. *Ante*, p. 1402. Indeed, in the absence of other sources of guidance, the majority relies almost exclusively on HEW's regulations. Inexplicably, however, that reliance does not extend to HEW's long-held interpretation that the Act permits, as its regulation provides, optional funding for non-mandatory programs giving aid to unborn children and their mothers.

Deferring to HEW on the question whether the Act contemplates optional aid does not run afoul of the Supreme Court's command that "the principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a)(10) that aid be furnished 'to all eligible individuals'." Townsend v. Swank, 404 U.S. at 286, 92 S.Ct. at 505. If the regulations were read as properly providing optional aid to individuals not technically eligible for AFDC assistance, no "eligible individuals" under the Act would be denied benefits. The majority may properly assert that the agency's interpretation disregards the holding in *Townsend* only by first declining to defer to HEW on the issue of whether optional aid is permissible under the Act. Having

The majority opinion does not reach the difficult question whether the unborn are children within the meaning of the Social Security Act. Since my disagreement is with the majority's interpretation of the regulation in question, it is unnecessary in this dissent to reach the complex issue of whether a fetus is a "child."

HEW's own regulation is the basic support for the majority's conclusion that the unborn are eligible beneficiaries of AFDC payments. The optional grants to the unborn, it is reasoned, are either grants to "eligible individuals" and thus mandatory under the *King-Townsend-Carleson* troika, or they are grants to ineligible individuals and thus illegal and *ultra vires*. The trap is both seductive and logical, but not unavoidable. An examination of the regulations in question will show that HEW's position[3] is neither mandated by nor inconsistent with the Social Security Act. If this is so, the states and HEW are not obligated to extend AFDC payments for the benefit of the unborn.

The regulation in question is analogous to other provisions by which HEW makes funding available to states under the AFDC program on a non-mandatory basis. HEW has promulgated four different provisions under 45 C.F.R. § 233.90(c)(2) which make payments optionally available in instances where technical eligibility is not present. Under section 233.-

thus narrowed the inquiry, the majority then "defers" to what it sees as HEW's interpretation of what is mandatory under the Act—despite the fact that HEW insists its regulation is not designed to explain what is mandatory under the Act. *See* note 7, *infra*. Either the agency's interpretation is to be respected or it is not. The bitter must be taken with the sweet.

3. As both the majority opinion and this dissent indicate, the Department of Health, Education and Welfare will be directly affected by the decision of the Court. The agency's practice over a long period of time and its view of its own regulation are of great importance. HEW was not a party in this case, however, nor did it appear before the Court. We were made aware of HEW's position by the submission to us of its *amicus curiae* brief in Wilson v. Weaver, N.D.Ill. 1972, 358 F.Supp. 1147, aff'd, 7 Cir., 1974, 490 F.2d 155.

90(c)(2)(i),[4] AFDC payments can be made to an eligible relative up to 30 days before the child is placed in the care of that relative. Since at the time a relative receives such payments he is not caring for a "dependent child," the payments are obviously beyond the statutory parameters. Just as obviously, however, such payments will enable the relative to purchase necessary food, clothing, toys and household items so that when the child does come into the relative's custody, proper care can begin immediately. Under section 233.90(c)(2)(iii),[5] a relative can receive payments for an entire month, even if the child leaves the eligible family situation sometime during the same month. Again, technical eligibility may be lost with the child's departure, but not absent are the obligations to pay for major expenses, such as rent and furniture, incurred in part for the child's benefit. In addition, the regulation avoids administrative problems inherent in attempting to allocate payments for less than a month. Section 233.90(c)(2)(iv)[6] allows payments to be made to persons who are not eligible relatives or caretakers specified in 42

4. 45 C.F.R. § 233.90(c)(2)(i) provides:
(2) Federal participation is available in:
(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC . . . .

5. 45 C.F.R. § 233.90(c)(2)(iii) provides:
(2) Federal participation is available in:
. . . . . .
(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC . . . . .

6. 45 C.F.R. § 233.90(c)(2)(iv) provides:
(2) Federal participation is available in:
. . . . . .
(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency situations that deprive the child of the care of the relative through whom he had been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

U.S.C. § 606(a), but who are providing temporary care to a child in emergency situations while other plans are being made for the child's care and support. Providing assistance to a technically ineligible person, consistent with the purposes of AFDC benefits, could not be more manifest.

In this context, the rationale of providing optional funding for payments to pregnant women allowed by section 233.90(c)(2)(ii), the regulation involved in this case, becomes more clear. By providing payments to women before the child is born, states can more effectively guarantee the provision of needed assistance immediately to post-partum children, those children who are clearly eligible for assistance under the Act. The other provisions allowing optional payments, sections 233.90(c)(2)(i), (iii) and (iv), are not statements that certain classes are "eligible individuals" under the Act; the fact of ineligibility is quite clear. Similarly, the optional extension in this case of "payments with respect to an unborn child" is not a determination that the unborn are "eligible individuals," and should not in fairness be so construed. The payments authorized by sections 233.90(c)(2)(i) through (iv) are justifiable because of their close and direct relationship to circumstances in which individuals will soon qualify for AFDC payments and will then be entitled to receive assistance under the Act. Moreover, the provisions for optional assistance are totally consistent with the statutory purpose of the AFDC program, even though such assistance is not specifically contemplated by the language of the statute. These regulations, which are well-considered and beneficial provisions, are valid under 42 U.S.C. § 1302, which gives the Secretary of Health, Education and Welfare the power to "make and publish such rules and regulations, not inconsistent with this chapter [which includes the Social Security Act], as may be necessary to the efficient administration of the functions with which [he] is charged . . . ." The regulation in this case thus does not have to be regarded either as a statement that the unborn are "eligible individuals" under the Act or as a provision that is illegal

and *ultra vires*. Rather, the provision can be accepted for what it is: an attempt to aid those not otherwise eligible for AFDC payments in order to assure more effective assistance to those who *are* eligible. Thus there is no proper basis for the majority's contention that HEW has indirectly declared the unborn to be "eligible individuals" properly the beneficiaries of AFDC payments.[7]

Viewed in the context of HEW's purpose in promulgating the regulation in question, HEW's conclusion that the unborn are not mandatorily eligible AFDC recipients is both logical and plausible. Nonetheless, the majority relies on this regulation, and this reliance is the basic support for a result which, it is conceded, cannot be derived from the legislative history or

7. HEW's position on the relationship between the existence of its regulation permitting optional assistance to the unborn and the majority's conclusion that the regulation implicitly means the unborn are "eligible individuals" within the meaning of the Social Security Act is set forth in HEW's *amicus* brief in Wilson v. Weaver, *supra*, as follows:

> Subdivision (ii) [45 C.F.R. § 233.90(c)(2)(ii)], relating to the unborn child, is of a piece with the rest of section 233.90(c)(2). When a child is expected but not yet born, and on the child's birth the statutory definition of "dependent child" will be met, federal financial participation is available, at state option, in anticipation of the birth of the child. The situation is an extension of that in subdivision (i), where a child is coming to live with a specified relative within 30 days. In addition to the prospective need for furnishings, layette and other items for the unborn child, the meeting of the mother's subsistence and health needs during pregnancy and at the time of birth may have a close relationship to the situation of the mother and child upon birth. . . .
>
> In this context, therefore, the availability of federal financial participation in respect to an unborn child *depends on the exercise of federal regulatory authority*, in relation to state-administered or supervised programs which vary from state to state, that gives options to the states, which the vast majority of the states have not chosen to exercise, to obtain federal matching for payments in certain limited and time-related situations where, however, the statutory definitions are not met at the time of payment. *But, in our view, neither the statute nor the regulations contemplate the imposition of mandatory coverage of unborn children upon the majority of the states which do not cover such children.*

HEW brief, *supra* note 3, at 15–16 (emphasis added).

indicia of congressional intent.[8] The reasonableness of the long-standing regulation and HEW's interpretation thereof, combined with the total lack of compelling reasons for ignoring this rational position, seem to me to magnify the error.

Two further points need brief statement. First, the majority's approach will unduly limit flexibility in the administration of the AFDC program. This program has been described by the Supreme Court as a "scheme of cooperative federalism." *E. g.*, King v. Smith, 392 U.S. 309, 316, 88 S.Ct. 2128, 2133, 20 L.Ed.2d 1118 (1968); Jefferson v. Hackney, 406 U.S. 535, 542, 92 S.Ct. 1724, 1729, 32 L.Ed.2d 285 (1972). The majority rationale, if logically followed, would cause the presently optional aid provisions in 45 C.F.R. §§ 233.90(c)(2)(i), (iii) and (iv), to which we have already adverted, to be declared either mandatory on the states or *ultra vires*. Not only would such a result be unfortunately erroneous, but it would harm the flexibility in the working relationship of the states and HEW, and impede new attempts to facilitate the delivery of assistance to those eligible for AFDC payments.

Finally, the majority's conclusion will present intricate and complex administrative problems to the states. The decision

8. The majority suggests by its statement that Congress "defeated" resolutions which would specifically exclude the unborn, that Congress has recognized the eligibility of the unborn. What in fact happened was that the House of Representatives passed an amendment "to *make clear* that an unborn child would not be included in the definition of a child." H.R.Rep. No. 92-231, 92d Cong., 2d Sess. 184 (1972), U.S.Code Cong. & Admin.News, p. 5170. The Senate Report approved and the Senate passed the same amendment, quoting with approval the House Report's language. S.Rep. No. 92-1230, 92d Cong., 2d Sess. 467 (1972) ("only children who have actually been born" are eligible for AFDC). The provision did not pass, however, as all welfare provisions were "bottled up" by the failure to agree on the Administration's subsequently abandoned Family Assistance Program. If any inference can properly be drawn from this action, it would be that Congress was of the strong opinion that the unborn are presently excluded from AFDC payments, and Congress wanted to correct the actions of HEW and the courts. At any rate, this congressional action does clearly indicate that the majority's decision is totally at odds with what Congress considers sound policy.

will allow a woman verifiably in her first month of pregnancy to begin receiving AFDC payments. But according to the principles in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), the same woman, up through the sixth month of pregnancy or until "viability," is entitled to abort the fetus subject only to regulation "reasonably relate[d] to the preservation and protection of maternal health." Roe v. Wade, *supra*, 410 U.S. at 163, 93 S.Ct. at 732. There are logical inconsistencies prevalent in a situation where it is held that Congress was so concerned with the well-being of fetuses that it provided for financial assistance to the unborn, but, notwithstanding such congressional concern, the mother of a fetus can abort her "eligible individual" at her whim. This perplexing paradox is necessarily presented by today's decision, and it should be noted that this situation is brought about solely as the result of judicial decisions. This serves only to reinforce our conclusion that the decision herein to mandate assistance to the unborn is one which should be left to the states of Mississippi and Georgia, or to the Congress of the United States.

I therefore am unable to join the majority opinion and respectfully dissent.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

SUPPLEMENTAL MEMORANDUM: RELATIONSHIPS AMONG POVERTY, PRE-NATAL NUTRITION, AND POST-NATAL DEVELOPMENT AND WELL-BEING.

As noted in the stiuplated testimony of Dr. Roy M. Pitkin (Single Appendix at 13-16), the extent to which a mother's nutritional needs are met during pregnancy is a major determinant of a child's post-natal development -- or even survival. The purpose of this Supplemental Memorandum is to summarize briefly, but more fully than the body of the attached Brief, some of the evidence regarding the relationships among poverty, pre-natal nutrition, and post-natal development. These relationships are significant to the issues in this case inthat they demonstrate that the Petitioners' policy of denying AFDC assistance to children and their mothers during the pre-natal period is totally inconsistent with the paramount purpose of AFDC: the protection of children.

Since what is ultimately involved in this case is financial assistance, it is useful to note at the outset that statistical studies have shown a relationship between pre-natal poverty and post-natal harm to both mothers and children. Thus, for example, the rate of maternal mortality due to toxemia (the most frequent cause of maternal death in the United States) varies considerably with income group.[1] Moreover, pre-natal poverty greatly increases the risk of abnormally low weight at birth -- a crucial determinant of subsequent development

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[1] National Research Council, Maternal Nutrition and Child Health, 130-31 (1950).

(see infra).[2]

Probably the most important way in which pre-natal poverty affects maternal and child welfare is through poor nutrition. A number of studies have confirmed that poor women have nutritionally inadequate diets, even during pregnancy.[3] These studies of course are consistent with common sense: Without financial means, a mother simply cannot obtain a diet that is adequate for the special demands of pregnancy.

Poor nutrition during the pre-natal period poses a number of grave risks to both mother and child, ranging from poor calcification of the bone structure to death. To a substantial extent, poor pre-natal nutrition poses dangers to the child during its post-natal existence because poor pre-natal nutrition is a major determinant of low birth weight.[4] As indicated in the Stipulated Testimony of Dr. Pitkin (Single Appendix at 14-15), birth weight is a major determinant of post-natal survival and development.

One of the most disturbing results of research on the effects of low birth weight on post-natal development has been the linking of low birth weight with mental subnormality and mental retardation.

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[2] U.S. Dept. of Health, Education and Welfare, Public Health Service, Vital Statistics of the United States, 1965, Vol. 2; Silverman and Sinclair, Current Concepts: Infants of Low Birth Weight, 272 New England J. Med. 448 (1966).

[3] Darby, et al., The Vanderbilt Cooperative Study of Maternal and Infant Nutrition, I, II, III, 51 J. Nut. 539 (1953); Jeans, et al., Dietary Habits of Pregnant Women of Low Income in a Rural State, 28 J. Am. Diet Ass. 27 (1952).

[4] See, Committee on Maternal Nutrition of the Food and Nutrition Board, National Research Council, National Academy of Sciences, Maternal Nutrition and the Course of Pregnancy: Summary Report 14 (1970); Smith, Effects of Maternal Undernutrition upon the Newborn Infant in Holland (1940-45), 30 Pediat. 229 (1947).

Low birth weight children are significantly over-represented among the mentally sub-normal late in life. Moreover, when development of the nervous system is impaired at a critical time in utero, full recovery is not possible by later nutritional intervention, no matter how zealous. Among very low birth weight infants, there is an increased incidence of epilepsy, cerebral palsy, and severe mental retardation.[5]

As noted earlier, pre-natal nutrition is a major determinant of survival.[6] Experience in the Soviet Union and the United Kingdom during World War II demonstrated this relationship in a striking manner. During the siege of Leningrad, during which pregnant women were unable to obtain a normal diet, the stillbirth rate doubled.[7] In the United Kingdom, on the other hand, although wartime resulted in an upheaval in general living conditions, unemployment was rare, and a government rationing program gave first priority to pregnant women. The result was that lower class women were actually receiving a better diet during pregnancy than they had received before the war. Significantly, during this wartime period, both the stillbirth and neonatal mortality rates declined significantly, among women whose

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[5] Birch, Functional Effects of Fetal Malnutrition, 134 Hosp. Practice 135-47 (1971) (cited and discussed in Stuart v. Canary, 369 F.Supp. 1343, 1346-47 (N.D. Ohio 1973).

[6] Testimony of Dr. Pitkin, Single Appendix at 14-15; Toverud, The Influence of Nutrition on the Course of Pregnancy, 28 C. Milbank Mem. Fund Quart. 7 (1950); Cameron and Graham, Antenatal Diet and its Influence on Stillbirths and Prematurity, 24 Glasgow Med. J. 1 (1944).

[7] Antanov, Children Born During the Siege of Leningrad in 1942, 30 J. Pediat. 250 (1947).

diets were adequately supplemented during pregnancy.[8]

The evidence regarding the relationship between pre-natal nutrition and post-natal welfare has led the National Research Council to conclude that:

> If a positive result is to be gained in reduction of premature births, attention must be paid to the environmental stresses, as well as to the nutritional status of pregnant women. Social and financial security are of the greatest importance in this connection. The better the care of pregnant women, the lower the stillbirth, premature birth and neonatal mortality rates, and the better the general health of newborn infants.[9]

Poor nutrition poses dangers to the mother as well as to the child. Studies by maternal mortalities committees have indicated that at least half of the maternal mortalities which occur could be prevented by improving diet and medical care.[10] The importance of diet in reducing maternal mortality is shown by the fact that the increase of proteins in the diet during the past fifty years has been the most important factor in reducing the incidence of toxemia.[11]

The preceding material has concentrated on some of the more recent empirical data showing the relationships between poverty, pre-natal nutrition, and child welfare and development. But it is useful to note that these relationships have been known to exist for many years. Thus, in their 1935 review of work on dietary requirements in

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[8] See, Balfour, Supplementary Feeding in Pregnancy, 1 Lancet 208 (1944).

[9] National Research Council, National Academy of Sciences, Maternal Nutrition and Child Health 130-31 (1950).

[10] National Research Council, National Academy of Sciences, Maternal Nutrition and the Course of Pregnancy 184 (1970).

[11] Id. at 176.

pregnancy and lactation, Garry and Steven concluded that

> [i]f the summary table above can be taken as even an approximate indication of the dietary requirements of women in pregnancy and lactation, then Orr's survey of diets in this country shows that a large proportion of women cannot hope to procure a diet adequate for the physiological strain of child-bearing. Any investigation into the causes of maternal morbidity and mortality should therefore take into account the diet of the mothers. Moreover, since the maternal diet in pregnancy and in lactation inevitably affects the wellbeing of the infant, the health of the whole population depends to a greater or less extent on the feeding and nutrition of the mothers.[12]

In 1972, the Subcommittee on Nutrition and Human Needs of the California Senate Committee on Health and Welfare conducted hearings into the effects on child health and development of cutbacks by the California Department of Social Welfare in the amount of AFDC assistance paid to pregnant women (California has for several years been one of the States which has considered pregnant women eligible for AFDC assistance with respect to their unborn children.) An Interim Report concluded that the "nutritional deprivation to the mother and fetus will predictably lead to tragic consequences to thousands of yet unborn children." This interim report stated that those consequences would include:

> A disproportionate number of babies born premature, with low birthweights;
>
> A disproportionate number of stillborn babies;
>
> A disproportionate number of physically and mentally damaged babies suffering lifelong handicaps.[13]

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[12] Garry and Steven, A Review of Recent Work on Dietary Requirements in Pregnancy and Lactation, With an Attempt to Assess Human Requirements, 5 Nutrition Abstracts 855, 882 (1935).

[13] Unborn and Underfed, An Interim Report on the Administration's Cutbacks in AFDC Grants to Pregnant Women on Welfare (submitted by Senator George S. Moscone, Chairman, Subcommittee on Nutrition and Human Needs to the California Senate Committee on Health and Welfare, January, 1973) (reproduced as Addendum C to this Brief, infra).

These conclusions are particularly significant in light of the fact that in California, pregnant women are eligible for AFDC on behalf of their unborn children, so that even with the reductions considered in the Subcommittee's hearings, women in that State would be receiving considerably more AFDC assistance during the pre-natal period than women in States, like Iowa, which do not provide any AFDC assistance during that time.[14]

[14] In light of the estimates by the State of Arizona with regard to the cost of AFDC eligibility for pregnant women, it is also interesting to note that Senator Moscone's Interim Report concluded that California's reduction in pre-natal AFDC assistance would result in increased costs to the state, because of increased hospital care for premature and otherwise abnormal newborns, other long-term medical care beyond infancy, and compensatory educational programs associated with the potential lifelong handicaps resulting from inadequate pre-natal nutrition. Addendum C, infra at c4-c5.

ADDENDUM C

UNBORN AND UNDERFED

An Interim Report on the Administration's Cutbacks In AFDC Grants to Pregnant Women on Welfare

Submitted by

Senator George R. Moscone

Chairman

Subcommittee on Nutrition and Human Needs

to the

Senate Committee on Health and Welfare

January 1973

BACKGROUND

On October 1, 1972 county welfare departments in Los Angeles, Santa Clara, Alameda and other counties throughout the state notified tens of thousands of pregnant women on AFDC that their welfare grants would be cut by as much as $65 per month. The effect of these cutbacks has been to substantially destroy a 23-year-old state policy designed to benefit soon-to-be-born children on AFDC.

Beginning in 1949, administrative policy was established recognizing the unborn child for purposes of AFDC eligibility and grant determination. The principal purpose of the policy, in keeping with changes in federal social security regulations, was apparent: to provide added dollars to the needy family at a critical time in order to maintain and improve the health prospects for the soon-to-be-born child. The wisdom of this policy was underscored by the fact that California's welfare statutes have historically limited welfare grants to substantially less than what those same laws say is necessary to meet the minimum standards of need for a family.

Effective October 1, 1972 SDSW adopted regulations dealing with the issue of "in-kind" income. According to SDSW, the counties are obliged to recognize--and deduct from the grant--all income and resources available to any recipient, including so-called in-kind income. In the example of the expectant mother with no other children, SDSW still recognizes the existence of the unborn child upon verification of pregnancy and accords

the family a grant of $190 per month. But then SDSW asserts that the mother is making an "in-kind" contribution of food, rent, utilities, and clothing to the fetus. According to the new regulations, $65 per month in in-kind income was then to be deducted from the $190 grant, leaving a monthly grant of only $125 as opposed to the $190 required by law.

In the case of a pregnant woman with one other child, the monthly grant was cut from $235 to $200; the grant for a pregnant woman with two other children was cut from $280 to $245, and so forth.

Because of the serious health and nutritional implications posed by these cutbacks, this Subcommittee held a series of four hearings--two in October and two in November--to investigate the impact of these cuts and to affix administrative responsibility for the action taken.

FACTUAL AND LEGAL ISSUES

During one of the Subcommittee's four hearings, SDSW Deputy Director Ronald Zumbrun offered testimony suggesting that no cutbacks had actually taken place. That testimony was misleading and, indeed, false. The facts are these: In the case of a pregnant woman on AFDC expecting her first child, in early 1971 such a family unit would have been entitled to a maximum grant of $140 per month. In June of 1971 that amount was raised to $176 per month as a result of a court ordered cost-of-living adjustment. On October 1, 1971, under the terms of the Welfare Reform Act, the California

Legislature further raised the AFDC grant to an expectant mother with no other children, from $176 per month to $190. In recognition of the general inadequacy of basic AFDC grant levels, the Welfare Reform Act also mandated similar grant increases to pregnant women with children other than the unborn child. Notwithstanding this clear history, on October 1, 1972 the Administration put its in-kind cutback scheme into effect through regulations which cut the grant to a pregnant woman with no other children from $190 per month to $125 per month. These regulations also made similar cutbacks to pregnant women with other children in the household. All this in disregard of the fact that the Welfare Reform Act made no change whatever which could justify any departure from the long-standing policy of providing the full measure of a grant increase upon verification of pregnancy.

During the Subcommittee's third hearing, Social Welfare Director Robert Carleson was asked under what authority in state law he had relied in instituting the so-called in-kind cutbacks. The Director pointed to the Welfare Reform Act generally and specifically alluded to changes in Section 11008 of the Welfare and Institutions Code. In point of fact, no change was made in that section of law--or in any other section of law--which could reasonably be interpreted to authorize a grant cutback to pregnant women on AFDC.

The Director further alluded to his view that there existed a federal mandate to institute the in-kind cutbacks. If such a statutory or regulatory mandate did indeed exist,

then presumably federal authorities would compel similar cutbacks in all states throughout the nation. Yet, this Subcommittee's independent investigation reveals that California is the only state utilizing the in-kind rationale to effectuate grant cutbacks to pregnant women.

Furthermore, a letter to the Director from Philip Schafer, Regional Commissioner of the United States Department of Health, Education and Welfare, strongly indicates HEW's view that the entire in-kind income scheme, as conceived by SDSW, is illegal.

THE HUMAN AND ECONOMIC COSTS

The Subcommittee received uncontroverted testimony from physicians, nutritionists, and other experts pointing to the serious nutritional deprivation which is associated with the AFDC grant cutbacks. The nutritional deprivation to the mother and the fetus will predictably lead to tragic consequences to thousands of yet unborn children. Those consequences will include:

- A disproportionate number of babies born premature, with low birthweights;
- A disproportionate number of stillborn babies;
- A disproportionate number of physically and mentally damaged babies suffering lifelong handicaps.

In addition to the human tragedy involved, the costs of these cutbacks will soon outweigh any savings. Among the costs will be:

- A minimum of $150 - $200 per day for the hospital care of premature and otherwise abnormal newborns;
- Other long-term medical care beyond infancy;
- Thousands of dollars per child for compensatory education programs and other remedial costs associated with lifelong handicaps.

THE DISREGARD OF MEDICAL OPINION:

An abundance of medical opinion, including countless studies, stress the critical importance of nutrition during pregnancy. Not only did top SDSW officials ignore the volumes of information in this area, these same officials apparently contacted no one as to the potential health consequences stemming from AFDC cutbacks to pregnant women.

At the second hearing of the Subcommittee, Dr. Walter Ballard of the Department of Public Health and Dr. Stubblebine, then Director of the Department of Mental Hygiene, testified that their respective agencies were not consulted or in any way contacted regarding their views as to the proposed regulatory cutbacks.

Moreover, the in-kind regulations were apparently drafted in secrecy at SDSW and then promulgated as "emergency regulations," effective immediately, thus cutting off the opportunity for a public hearing prior to their implementation.

It seems clear that top officials at SDSW were determined to pursue the in-kind cutbacks to pregnant women, in disregard of all available expert opinion, and without even affording an opportunity for such opinion to be registered in timely public hearings.

PARTIAL RESTORATION

As might be expected, a growing body of public and professional criticism emerged in the wake of the AFDC cutbacks. With this criticism building, on November 28th, just one day before the Subcommittee's fourth scheduled hearing, Director Carleson adopted an emergency regulation which partially restored the cutbacks. A pregnant woman, expecting her first child on AFDC, would receive a basic grant of $172 per month, rather than the $125 per month under the previous in-kind cutback scheme. Thus, for these families the Director restored $47 to the basic grant. But, this is only $47 of the $65 cutback, leaving a basic grant which is still $18 less than the $190 per month mandated by the Legislature.

Throughout the many weeks of controversy regarding the in-kind cutbacks, top SDSS officials have publicly proclaimed the propriety of the cutbacks and the adequacy of the basic AFDC grant level. Yet, after the cutbacks were in effect two full months, SDSS ordered a restoration of $47 of the $65 per month cutback to a woman expecting her first child. The question now emerges: After cutting the grants precipitously, and then later partially restoring the basic AFDC grant, who in the Administration is now prepared to take responsibility for the damage done during the two months in which the full cutbacks were in effect?

And, who is prepared to accept the responsibility for the

continuing $18 gap between the $190 per month grant required by state law and the $172 grant under the November 28th SDSW regulations?

Finally, who is prepared to accept responsibility for the fact that there has been no reference whatever as to the cutbacks to thousands of pregnant women with other children in the AFDC household?

CONCLUSION:

From the outset, the Administration's in-kind cutbacks to pregnant women have been a cruel and shoddy attempt to effectuate short-run welfare savings without regard to the tragic human consequences.

The conduct of key Administration officials--in SDSW, in the Health and Welfare Agency, and presumably in the Governor's office--has been deplorable. The actions of those officials have been reckless, irresponsible, and destructive of human life.

RECOMMENDATIONS

I. The damage and tragedy inflicted to date cannot be undone. But it can be stopped before it goes further. The Administration can--and must--immediately adopt regulations rescinding the in-kind cutbacks and restoring full benefits to all pregnant women on AFDC.

II. In addition, the Administration should immediately adopt regulations insuring that the $9 special dietary

allowance be automatically granted upon verification of pregnancy and without further eligibility criteria.

III. Finally, the Administration should adopt a procedure by which all decisions which could adversely affect the health and well-being of AFDC recipients be first cleared through the appropriate health officials and experts within the departments of public health and mental hygiene.

George R. Moscone

1d

ADDENDUM D

IV. B. 7. c. (1) Definition of dependent child
x - V. A. 1. a. (3) (a) Use of Federal funds
x - V. E. 2. Audit policies

15:0D

June 25, 1940

Regional Director, Chicago
Attention: Miss Martha F. Phillips,
Public Assistance Representative

Peter Kasius, Associate Director,
Bureau of Public Assistance

Exceptions to Payments on Behalf of Unborn Child -- Wisconsin Aid to Dependent Children Audit for the Period February 1, 1936 to December 31, 1937 -- Your Memorandum of February 21, 1940 and Our Memorandum of April 1, 1940.

No final decision has yet been made with respect to the proposed Wisconsin plan provision of including unborn children in the aid to dependent children program nor with respect to exceptions to payments to unborn children included in the Wisconsin aid to dependent children audit report for the period February 1, 1936 to December 31, 1937, which were appealed by the state in its brief of November 27, 1939.

In our memorandum of April 1, in reply to yours of February 21, "Appeal--Wisconsin Aid to Dependent Children Audit Report--for the period February 1, 1936 to December 31, 1937," we stated:--

> "At present, we are unable to answer the question of whether Federal participation in payments in behalf of unborn children will be allowed. The question has been referred to the Office of the Director of the Bureau for determination, and we shall advise you as soon as a definite policy is established."

* * *

Peter Kasius

ADDENDUM E

May 27, 1940

Peter Kasius, Associate Director,
Bureau of Public Assistance

Division of Standards and Procedures,
Bureau of Public Assistance

Wisconsin--Agenda--Federal Participation in State Payments in Behalf of Unborn Children

Following the conference on May 21 on payment with respect to an unborn child, Mrs. Stanton has reported verbally that a comprehensive search of the files has produced no supporting information on the medical determination of pregnancy. We believe that any statement of policy will need a very careful piece of research and experimentation to establish adequate safeguards for the use of public funds and for recipients of public assistance as well.

For the present, we recommend that payments to an appropriate relative who is otherwise eligible to receive aid to dependent children may include an amount for an unborn child with respect to which the terms of the definition in Section 406 of the Federal Social Security Act may be found presumptively to obtain.

ADDENDUM F

IV. B. 7. c. Definition of dependent child
x - V. A. 1. A.(3)(a) Use of Federal funds

July 3, 1940

Regional Director, Chicago
Attention: Miss Martha E. Phillips,
Public Assistance Representative

Division of Plans and Grants,
Bureau of Public Assistance

Wisconsin--Federal Participation in State Payments in Behalf of Unborn Children

In reply to our memorandum of May 27, 1940, you have indicated that the State agency has no additional plan material to submit with respect to the procedures by which eligibility of an unborn child for assistance payments is determined, as outlined in the State's memorandum of February 9, 1940. As you know, there was an inter-bureau conference on this subject on Tuesday, May 21, 1940, at which time it was decided that a statement of policy would be drafted on this subject for the consideration of the Social Security Board. In this memorandum, however, we are confirming the consensus of the thinking at the conference.

It was the consensus of the conference that legally it was possible to recognize the existence of a child prior to its birth. For purposes of Federal matching, therefore, it is felt that section 406(a) of the Social Security Act governing the age of a dependent child could be interpreted to include a child prior to its birth.

It was pointed out at the meeting that a medical determination of the existence of an unborn child can be made with reasonable accuracy. It was felt that the State agency should claim matching only with respect to those payments where there is available an accurate medical determination as to the existence of the child.

There was some feeling at the conference that the Board should not take the position of promoting this extended interpretation of the Federal act but that there is nothing in the Social Security Act which would prohibit the State from claiming Federal matching in behalf of the unborn child.

The Bureau of Public Assistance is proceeding with the formal statement of policy on this subject, and no action can be taken at this time which would commit the Board to matching of payments in behalf of unborn children. It was felt, however, that you should have the benefit of the consensus of the conference.

Gertrude Gates
Chief

ADDENDUM G

OFFICE OF THE BOARD

May 21, 1941

TO: Miss Hoey
Mr. Corson
Mr. Falk
Mr. Stern
Mr. Tate
Mr. Widhart
Miss Engle
Miss Beaman
Miss Wasserman

FROM: Maurine Mulliner

At the meeting of the Board on May 20, 1941, the following action occurred:

"The Board considered the memorandum from Miss Hoey dated May 10, 1941, 'Extension of Aid to Dependent Children in Behalf of Unborn Children' (Document No. 177-b) recommending that Federal participation be extended on behalf of unborn children to those States which include provisions for unborn children within the scope of the aid to Dependent Children program. Following considerable discussion the Board deferred a decision on this proposed interpretation of Section 406(a) until the next meeting when all Members of the Board are present."

Maurine Mulliner

ADDENDUM H

I V B 7 c Definition of dependent child
x V A 1 a (3)(a) Use of Federal funds
x V E 2 Audit policies
16:PA
May 21, 1941

Mr. Robert Bingham,
Assistant General Counsel,
Office of the General Counsel

A. D. Smith

Aid to Dependent Children - Extension to Include Children en Ventre sa Mere

Jack Tate asked me to acquaint you with the background of the discussion of the Bureau and the Board relative to the recognition of children en ventre sa mere. The propriety of matching payments to this group has been under advisement of the Bureau of Public Assistance practically ever since the beginning of the program. Progressive elements in the States have suggested it and there is some law or practice in the States which encompasses this group.

Personally you will no doubt not need to read the rather lengthy memorandum which I personally wrote on the issue sometime ago. . . .

* * *

Of course the argument for the recognition of the child is considerably strengthened by the fact that what we are doing is once here simply to define the word "child." I see no reason in the world why a child en ventre sa mere, diagnostically existent and subject only to the hazard of birth, is not a child. As far as its support is concerned the urge is overwhelming. It is the major period in the life of the child when help will be effective and when all further help will be made more effective. As applied to public assistance the fact that one or more children already exist in the family and that the mother is also with child makes it seem almost foolish not to permit the additional $12 to be added in behalf of the new conception. . . .

* * *

A. D. Smith

ADDENDUM I

C O P Y

16:SR

Ruth O. Blakeslee, Chief,
Standards and Procedures Division

March 23, 1939

Office of the General Counsel,
A. D. Smith, Prin. Atty.

The right of a child en ventre sa mere to receive aid to dependent children.

I have given some thought to the position of the Social Security administration in relation to unborn children, following the comprehensive survey of the law contained in Mr. Johnston's research memorandum of February 7, 1939.

The Pennsylvania law provides as follows:

"A mother shall be entitled to assistance under this Act for an unborn child, in like manner as for other children, if she has one or more children living which entitle her to the benefits of this Act." (P.L. 893, Section 9, as amended by P.L. 118, Laws of 1939, Section 5.)

Of course the limiting condition with respect to other children is a pure statutory limitation in Pennsylvania. It seems obviously allied historically to the mothers' aid theory which would treat the pregnancy merely as an additional cause of need of an eligible mother, whereas the aid to dependent children category has developed reciprocally to social legislation for the protection of children and its focus is upon the needs of the respective child. Under aid to dependent children theory eligibility is separately determined in relation to the existence of any child. The mother does not gain a general eligibility to aid by reason of the existence of a child, but the child derives a call upon the State operating through the guardianship of the mother.

My rationalization of this matter is as follows: There is fairly uniform authority which states in so many words that a child en ventre sa mere is to be regarded as a person in being insofar as it is necessary to insure the receipt by the child of benefits which accrue to the child itself. In other words while only those children whose birth antedates the controlling event can act as conduits of title from which others derive rights, the existence of unborn children is judicially recognized insofar as their own rights and benefits require it.

Now it is perfectly true that the principle was most often applied in property law where it is conditioned upon the subsequent birth of the child -- quite naturally so since the inheritance benefits for which

his existence is recognized are only operative for the child's own benefit. If the child is not subsequently born, the recognition of its existence for inheritance purposes could in the nature of things have significance only to others than the child. Acting as a conduit of rights and benefits to be enjoyed only by others is not a sufficient benefit to the child, when you are thinking in terms of property ownership.

In the same way ordinary civil rights naturally depend upon birth as they become only pertinent in respect of existence after birth. Analogous principles are applied in other types of cases cited in our case memorandum where recognition is made to depend on whether the child is quick or capable of separate existence if prematurely born. In other words recognition is accorded on a condition pertinent to the insurance of individual benefit from the recognition.

A wealth of extra-judicial authority can be cited in support of the fact that a child's development is basically conditioned upon adequacy of prenatal care. Unless the State can act in relation to such care its ministrations in behalf of the child subsequently are often basically prejudiced. Lack of sustenance prejudices constitutional development. Even the courts have acknowledged the truth of this extra-judicial authority as in the case of Metzger v. People, 93 Col. 133, 53 Pac. (2d) 1189. This case is obviously in point because it presents an action for non-support of an unborn child by its father under a statute giving the juvenile court jurisdiction in such cases. The court said in part:

> "It is no longer doubted that the months of prenatal existence are tremendously important ones from the standpoint of human welfare. * * *"

The court goes on to indicate the importance of prenatal care and adds that the failure of the father against whom the proceeding is brought to maintain the appropriate support

> "jeopardizes the health and safety of the offspring as a future citizen of the community."

I cite this case of course not as an authority upon any question of construction since the statute applied from conception. I cite it to indicate legal recognition of the validity of principles which assert the necessity for the State's intervention at an earlier period than actual birth, and which become important to the construction of our own definition.

Here in our situation we have State aid authorized for the specific purposes of the child's own development so that insofar as it is necessary to reach the child earlier than its actual birth the previous occurrence of birth is no test of benefit.

This can be phrased even more cogently. The occurrence of birth does not furnish a relevant point of departure. It has no more significance to us than the successful passing of any other crises in the child's

development. We are blinded by our tremendous regard for birth because of its significance in other respects. The number who in the past have died in the course of birth is the greatest cause of our attitude. The really basic condition of life is conception. The State necessarily acts through the mother or actual caretaker of the child anyway.

The facts which make recognition of prenatal existence essential in our case become pertinent prior to birth, not merely after birth, and earlier conditions of recognition are essential to insure the child's own benefit in cases where assistance is actually necessary. I concede, of course, that my determination is premised on the fairly uniform effect of extra-judicial authority.

It is always proper to construe any such statutory provision so as to achieve the law's purpose and make the legal provision effective. Insofar as the provision may be made ineffective because of the delay in recognition, the administrator should be called upon to preserve the effective operation of the law by intervening at the earliest stage necessary to achieve the purposes of the law. Hence I submit that any aid given prior to birth should be conceived of as incidental to the purpose and principle authorization of the law, and authority should therefore be conceded even by those who consider that the law affects born children primarily. Why, it may be asked, must we start with a child whose constitution is forever undermined by the fact that its mother's strength, on which it's own life depends, is diverted to other tasks? A great deal of authority on statutory construction could be cited for this purpose.

* * *

After all we are merely construing the word "child." The case of Foster v. State, 182 Wis. 298, 196 N.W. 233, is therefore pertinent in differentiating the embryo from a quick "child." Coke differentiated pregnancy from a "quick child" and this is carried over into criminal statutes.

Other analogies may be found in the possible construction of the words "parent", "father", "mother", and "child" to include a foster parent, as indicated in the Harvard Law Review, 52 H.L.R. 515. It is not at all uncommon for the law to construe words of relationship to include relationships created by law rather than to confine them to their natural relationship, when the legal incidents are the same in either instance. In Faber v. Industrial Commission, 352 Ill. 115; 185 N.E. 255, a woman in loco parentis to the employee was held to be a parent. The Workmen's Compensation cases are obviously pertinent here. They recognize a child unborn at the time of the controlling event or accident as a dependent. The fact that a child has to be born under a certain compensation case to receive the actual benefits is not a relevant condition in our case since our statute is founded upon aid through the mother. The theory is different. The care and maintenance of the child is the object of the statute not the independent right to moneys in compensation for parental injury. The right of the child to assistance is a mere right to expenditure for its benefit.

The legal constructions of words of relationship, however, go beyond what we are talking about since we are dealing with the ante-human being but merely at an earlier point of its development. All we are saying is that a child is a child prior to delivery, as all the world knows, and we are doing it merely for the purpose of safeguarding the State's expenditure of money at a later period.

There appears to be ample authority even in common parlance as the court said in the Poplar case for us to talk of a child in respect of one not yet delivered. There is no construction involved. It is the common accepted meaning of words. The more authentic the processes of birth become under modern protective measures, the less hesitancy there is in our reference to the child. It is freely conceded in case after case that the law has been hampered by its attempt to formulate principles prior to the scientific development of obstetrics. This has been a real influence in tort cases where the law fears imposition.

* * *

I do not think that residence requirements can be deemed to have any relevancy in this aspect of coverage. As in the case of civil rights, the child has no separate residence prior to birth and only gradually acquires separate residence conditions thereafter. Prior to birth it is natural to think of the residence qualifications only in terms of the mother. The relationship also conditions residence after birth. You construe the residence requirements in the light of what the legislature imposes in the case of both mother and child. You cannot carry over the conditions imposed so as to affect your definition of the concepts of mother and child.

I think, therefore, we are fully justified in matching payments actually made by a State for the benefit of a child some months prior to its birth where it is shown that those payments are necessary to insure the adequate start and opportunity of the child and thus to utilize the subsequent aid more effectively and without the irreparable prejudice to its own life caused by diversion of maternal energies.

Judicial recognition in many instances hinges on the condition that the child be quick or capable of a separate existence. As I see it the latter condition has no relevancy. The condition of quickness, however, has often been deemed essential to the legal concept of life since the time of Blackstone. The concept of quickness may therefore have some significance. I do not think, however, that this condition has to be at all rigidly applied. I think it might serve as a general guide. As soon as there is no question of abortion, we may take the position that the preservation of the life may depend upon the ability of the mother to refrain from work. Help given from this time is therefore definitely a service to the child.

I think that this should be our guide and that the institution of such procedure should depend upon conditions of accurate diagnosis and apart from that should be governed by the indicated requisites of the case.

It seems to me that any other rule would in many cases render the State helpless. It would mean that the State could act only on a contingency, the contingency of birth, which has no rational bearing in our case although it may have in the definition of a particular crime such as a murder or with respect to the inheritance of property. The moment you repudiate those considerations of legal interpretation which are pertinent only to the resolution of specific issues for which the question of prenatal recognition is being determined, you are left to face the apparent fact that the law is premised upon the more basic underlying principle that every child has a prenatal existence whatever the particular condition it may in any case attach to its recognition. Each condition of that recognition has been devised to meet a particular situation to which it is pertinent. I cannot therefore see how any criticism could attach to the interpretations of the Social Security Act in the light of that general recognition and in such a way as to permit the fulfillment of its purpose.

I would therefore advocate immediate consideration of this from a policy standpoint, including the laying down of conditions for the inclusion of such assistance with an urge to the States to provide such relief in all cases of unquestionable diagnosis and according to the needs of the particular case.

If this is decided upon, this office could then prepare a memorandum of argument and authority for the use of the States and their legal advisers. For this purpose we suggest that we be accorded references to any extra-judicial authority of real merit upon the question as to the importance of prenatal relief in relation to the constitutional development of the child, and perhaps as an aid in the safeguarding of normal birth and maternal functioning.

A. D. Smith

ADDENDUM J

IV B 7 c (1) Definition of dependent c[hildren]
x V A 1 a (3)(a) Use of Federal Funds
x II A 1 c U.S. Childrens Bureau: Co[opera-]tive Relationship with Audit Policies

15:SP

August 23, 1941

Regional Director, Chicago
Attention: Miss Martha E. Phillips,
Public Assistance Representative

Peter Kasius, Acting Director,
Bureau of Public Assistance

Wisconsin--Extension of Aid to Dependent Children in Behalf of Unborn Children--Attaching Statement Prepared by Standards and Procedures - referring to RFL 331, dated August 9, 1941

On July 15, 1941, the Board considered the question raised by Wisconsin as to whether title IV could be interpreted to permit extension of the aid to dependent children program to include provision for unborn children within the scope of the State's approved plan. For your information we are attaching the statement of Bureau recommendation on this question and the memorandum sent to other regional representatives by the Division of Standards and Procedures. An item covering the audit aspect of the Board's decision on the matter was included in the Regional and Field Letter dated August 9, 1941.

The Board approved the Bureau's recommendation that Federal participation may be extended on behalf of unborn children to those States which include provisions for unborn children within the scope of the aid to dependent children program. It was decided, however, that no formal policy would be enunciated, but that the decision with reference to Wisconsin might constitute a precedent that could be followed if other States wish to extend the scope of their aid to dependent children program by similar interpretation.

You are, therefore, advised to communicate the Board's decision to Wisconsin. . . .

* * *

As you have indicated in earlier memoranda on the subject, it will be necessary for the Wisconsin agency to [illegible] supplementary plan material to its aid to dependent children to include children now covered by section 48.311 of the Wisconsin statutes. In this connection, we suggest that you point out to the State

agency the necessity that the State plan material on this extension of the aid to dependent children program make it clear that the requirements and standards applicable to aid to dependent children are equally applicable to this group, particularly the requirement regarding cash payments and the requirement that the State plan be State-wide in operation and effective in all political subdivisions. We recognize that the State may wish to supply special benefits to this group in the form of medical care, etc. over and above the aid to dependent children payments on which Federal matching is requested, and there is no objection raised to such a practice.

Peter Kasius

ADDENDUM K

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
Welfare Administration
Bureau of Family Services

February 4, 1965

POLICY INFORMATION RELEASE NO. 37

In reply refer to:
15:D

TO ALL PUBLIC STAFF FOR INFORMATION ONLY

SUBJECT: Inclusion of Unborn Child in AFDC Payments (List under Eligibility, Determination of and Aid to Families of Dependent Children; File under IV-A)

A State plan provision providing for assistance to an unborn child only if the mother is already a recipient of AFDC for one or more other children cannot be accepted. Such a plan provision is not in compliance with the requirements of Title IV of the Social Security Act.

A State may include unborn children under its approved AFDC plan and receive Federal financial participation in payments to meet their need, if such children meet the definition of "dependent child" in section 406 (a) of the Act. This is consistent with the objectives of the Act. However, the conditions under which coverage of the program is extended to unborn children must be established on the basis of principles that assure equitable and uniform treatment of all individuals in like circumstances of need in order for the State to continue to qualify for Federal grants for its AFDC program. To include only the unborn child whose mother is already receiving AFDC does not meet these principles. The question arises from the fact that coverage is extended only to the unborn child of a mother who is a recipient because she has at least one other child who qualifies for AFDC. It excludes the unborn child of a pregnant woman who does not have a child eligible for AFDC but is in similar circumstances as to need and parental deprivation.

Such a State plan proposal discriminates arbitrarily and capriciously against such a child and, therefore constitutes a classification that is unrelated to need and is unreasonable in terms of the objectives and principles governing administration of the AFDC program.

ADDENDUM L

REGULATIONS

Handbook of Public Assistance Administration Part IV (1946), (Eligibility and Payments to Individuals):

3400. Several factors combine to make up the definition of "dependent child" as used in title IV of the Social Security Act. These eligibility provisions have been interpreted individually, but each interpretation is related to a definite concept of the objectives of aid to dependent children. The interpretations are intended to define and clarify the area of operation in which the Federal Government can participate financially under the act. This has been done (1) to free States from some of the uncertainties that have been partly responsible for restrictions limiting coverage, and (2) to support States in improved practice that accomplishes the objectives of the program.

The specific eligibility factors in aid to dependent children are interpreted in the light of two proper objectives: (1) indication of the scope of coverage in Federal-State aid to dependent children programs consistent with the provisions of the Social Security Act; (2) the provision and continuity of service. The interpretations recognize that during periods of special stress or difficulty for children, continuity of service may be of particular importance. Federal participation in the program may be continued for temporary periods while necessary adjustments and readjustments are being worked out in specified situations.

These interpretations, while making possible an increased scope for the development of State policy and practice within the legal framework of the Federal act, are not intended to limit the States in providing programs that extend beyond the bounds of Federal financial participation.

* * *

3410. Deprivation of Parental Support or Care

3411. Provision of the Act

Title IV, section 406 (a) reads:

> "The term 'dependent child' means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . ."

3412. Interpretation

This provision sets forth the two eligibility factors, "need" and "deprivation of parental support or care," on which Federal participation is conditioned. The provision requires that both need and deprivation of parental support or care exist in the individual case but does not require that an affirmative showing be made that a causal relationship exists in the individual case.

Under the act, the term "deprived of parental support or care" is interpreted to encompass the situation of any child who is in need and otherwise eligible, and whose parent either has died, has a physical or mental incapacity, or is prevented by continued absence from providing maintenance, physical care, and guidance for his children. In this interpretation "parent" may mean either the father or the mother. Since the interpretation relates to parental support or care, it is equally applicable whether the parent was the chief breadwinner or devoted himself or herself primarily to the care of the child.

Situations within the scope of the term "deprivation" are as follows:

* * *

6. Unborn Children

When the mother's pregnancy has been determined by medical diagnosis, Federal participation in payments on behalf of an unborn child may be claimed on the basis of the same eligibility conditions as apply to other children.

* * *

L3

Iowa State Dept. of Social Services Employees' Manual XII-1-10a, 10b:

MEDICAL ASSISTANCE

GENERAL

GROUPS COVERED BY MEDICAL ASSISTANCE

1. Recipients of aid to dependent children including children under age 21 in such families who are ineligible because of age

* * *

2. Individuals and families whose assistance grants were cancelled effective October 1, 1972, as a result of the 20% increase in Social Security benefits which became effective on that date.

* * *

3. Persons Receiving a Monthly Payment under the Supplemental Security Income Program for the Aged, Blind and Disabled (SSI)

* * *

4. Persons Receiving Care in a Medical Institution (hospital, skilled nursing facility or intermediate care facility) who meet all eligibility requirements for SSI except for income and whose income does not exceed the cost of care in the facility based on the Department's standards or 300% of the basic SSI payment whichever is the lesser amount. (See XII-1-Part Two)

5. Children under age 21 in foster care for whom the Department has assumed financial responsibility either in whole or in part including children in subsidized adoptive placements. (See Employees' Manual, VIII-6, FOSTER CARE SERVICES)

Iowa State Dept. of Social Services Employees' Manual XXII-1-14:

MEDICAL ASSISTANCE (cont'd)

AMOUNT, DURATION AND SCOPE OF MEDICAL AND HEALTH SERVICES (cont'd)

* * *

1. Physicians (Doctors of Medicine and Osteopathy)

* * *

Scope of Service - Payment will be approved for all services and supplies provided by the physician including services rendered in the physician's office or clinic, the home, in a hospital, nursing home, or elsewhere.

* * *

Certificate of Service

I, Robert Bartels, hereby certify that on the 16th day of December, 1974, I mailed one (1) manuscript copy of the BRIEF FOR RESPONDENTS, correct postage prepaid, to:

Lorna Lawhead Williams
Special Assistant Attorney General
State Capitol
Des Moines, Iowa 50319
Attorney for Petitioners

I further certify that all parties required to be served have been served.

Robert Bartels

ROBERT BARTELS
College of Law
University of Iowa
Iowa City, Iowa 52242
Attorney for Respondents

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* ALCALA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 73-1708. Argued January 22, 1975—Decided March 18, 1975

For the purposes of eligibility for benefits under the Aid to Families with Dependent Children (AFDC) program, § 406 (a) of the Social Security Act defines "dependent child" as "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother," or certain other designated relatives, and (2) who is under the age of 18, or under the age of 21 and a student. *Held:* The term "dependent child," as so defined, does not include unborn children, and hence States receiving federal financial aid under the AFDC program are not required to offer welfare benefits to pregnant women for their unborn children. Pp. 2–10.

(a) Under the axiom that words used in a statute are to be given their ordinary meaning absent persuasive reasons to the contrary, and reading the definition of "dependent child" in its statutory context, it is apparent that Congress used the word "child" to refer to an individual already born, with an existence separate from its mother. Pp. 4–6.

(b) This conclusion is also supported by the limited purpose of the AFDC program to substitute for the practice of removing needy children from their homes, and to free widowed and divorced mothers from the necessity of working so that they could remain home to supervise their children, and by the fact that the Social Security Act also provides federal funding for prenatal and postnatal health services to mothers and infants, explicitly designed

Syllabus

to reduce infant and maternal mortality, rather than providing "maternity benefits" to support expectant mothers. Pp. 6–8.

(c) The doctrine that accords weight to consistent administrative interpretation of a statute does not apply to a Department of Health, Education, and Welfare (HEW) regulation allowing States the option of paying AFDC benefits to pregnant women on behalf of unborn children, where HEW says that the regulation is not based on a construction of the term "dependent child" but on HEW's general authority to make rules for efficient administration of the Act, and where legislative history tends to rebut the claim that Congress by silence has acquiesced in the view that unborn children qualify for AFDC payments. Pp. 8–10.

494 F. 2d 743, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion. DOUGLAS, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-1708

Kevin J. Burns, Etc., et al., Petitioners, *v.* Linda Alcala et al. } On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[March 18, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question presented by this case is whether States receiving federal financial aid under the program of Aid to Families with Dependent Children (AFDC) must offer welfare benefits to pregnant women for their unborn children. As the case comes to this Court, the issue is solely one of statutory interpretation.

I

Respondents, residents of Iowa, were pregnant at the time they filed this action. Their circumstances were such that their children would be eligible for AFDC benefits upon birth. They applied for welfare assistance but were refused on the ground that they had no "dependent children" eligible for the AFDC program. Respondents then filed this action against petitioners, Iowa welfare officials. On behalf of themselves and other women similarly situated, respondents contended that the Iowa policy of denying benefits to unborn children conflicted with the federal standard of eligibility under § 406 (a) of the Social Security Act, as amended, 42 U. S. C. § 606 (a), and resulted in a denial of due process and

equal protection under the Fourteenth Amendment.[1] The District Court certified the class and granted declaratory and injunctive relief. The court held that unborn children are "dependent children" within the meaning of § 406 (a) and that by denying them AFDC benefits Iowa had departed impermissibly from the federal standard of eligibility. The District Court did not reach respondents' constitutional claims. *Alcala* v. *Burns*, 362 F. Supp. 180 (SD Ia. 1973). The Court of Appeals for the Eighth Circuit affirmed. 494 F. 2d 743. We granted certiorari to resolve the conflict among the federal courts that have considered the question.[2] — U. S. —. We conclude that the statutory term "dependent child" does not include unborn children, and we reverse.

II

The Court has held that under § 402 (a)(10) of the Social Security Act, 42 U. S. C. § 602 (a)(10), federal participation in state AFDC programs is conditioned on the State's offering benefits to all persons who are eligible under federal standards. The State must provide benefits to all individuals who meet the federal definition of "dependent child" and who are "needy" under state standards, unless they are excluded or aid is made optional by another provision of the Act. *New York State Dept. of Social Services* v. *Dublino*, 413 U. S. 405, 421–422 (1973); *Carleson* v. *Remillard*, 406 U. S. 598 (1972); *Townsend* v. *Swank*, 404 U. S. 282 (1971); *King* v. *Smith*, 392 U. S. 309 (1968). The definition of "dependent child" appears in § 406 (a) of the Act:

"The term 'dependent child' means a needy child

[1] The complaint was framed under 42 U. S. C. § 1983, and jurisdiction in the District Court was based on 28 U. S. C. § 1343 (3). See *Hagans* v. *Lavine*, 415 U. S. 528 (1974).

[2] The cases are cited in *Parks* v. *Harden*, 504 F. 2d 861, 863, n. 4 (CA5 1974).

> (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment . . . ." 42 U. S. C. § 606 (a).

The section makes no mention of pregnant women or unborn children as such.

Respondents contend, citing dictionary definitions,[3] that the word "child" can be used to include unborn children. This is enough, they say, to make the statute ambiguous and to justify construing the term "dependent child" in light of legislative purposes and administrative

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[3] *E. g.*, Webster's Third New International Dictionary (1961), which includes as one definition of "child," "[a]n unborn or recently born human being: fetus, infant, baby." This, of course, is only one of many definitions for the word "child," and its use with reference to unborn children is not the most frequent. Webster's New International Dictionary (2d ed. 1957) qualified the definition quoted above by adding, "now chiefly in phrases. Cf. *with child, childbirth*." Respondents have candidly furnished citations to other current dictionaries that do not indicate that the word "child" is used to refer to unborn children. Respondents acknowledge that reliance on dictionaries cannot solve the question presented in this case. At most, the dictionaries demonstrate the possible ambiguity in the term "dependent child."

interpretation.[4] They argue that both factors support their position in this case. First, paying benefits to needy pregnant women would further the purpose of the AFDC program because it would enable them to safeguard the health of their children through prenatal care and adequate nutrition. Second, for over 30 years the Department of Health, Education, and Welfare (HEW) has offered States an option to claim federal matching funds for AFDC payments to pregnant women.[5]

A

Several of the courts that have faced this issue have read *King*, *Townsend*, and *Carleson*, *supra*, to establish a special rule of construction applicable to Social Security Act provisions governing AFDC eligibility. They have held that persons who are arguably included in the federal eligibility standard must be deemed eligible unless the Act or its legislative history clearly exhibits an intent to exclude them from coverage, in effect creating a presumption of coverage when the statute is ambiguous. See *Carver* v. *Hooker*, 369 F. Supp. 204, 210–215 (NH 1973), aff'd, 501 F. 2d 1244 (CA1 1974); *Stuart* v. *Canary*, 367 F. Supp. 1343, 1345 (ND Ohio 1973); *Green* v. *Stanton*, 364 F. Supp. 123, 125–126 (ND Ind. 1973), aff'd *sub*

[4] See *United States* v. *Southern Ute Tribe or Band of Indians*, 402 U. S. 159, 173 n. 8 (1971); *Studebaker* v. *Perry*, 184 U. S. 258, 269 (1902); *Merritt* v. *Welsh*, 104 U. S. 694, 702–703 (1881).

[5] The current regulation provides that "[f]ederal financial participation is available in . . . [p]ayments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis." 45 CFR § 233.90 (c)(2)(ii) (1973). Although the regulation itself does not say expressly that aid to unborn children is optional with the States, HEW's administrative practice makes clear that this regulation allows States to exclude unborn children from their AFDC programs. As of 1971 HEW had approved 34 state plans, including Iowa's, that furnished no aid to unborn children. *Alcala* v. *Burns*, 494 F. 2d 743, 745 (CA8 1974).

nom. Wilson v. *Weaver*, 499 F. 2d 155 (CA7 1974). But see *Mixon* v. *Keller*, 372 F. Supp. 51, 55 (MD Fla. 1974). This departure from ordinary principles of statutory interpretation is not supported by the Court's prior decisions. *King*, *Townsend*, and *Carleson* establish only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional. The method of analysis used to define the federal standard of eligibility is no different from that used in solving any other problem of statutory construction.

Our analysis of the Social Security Act does not support a conclusion that the legislative definition of "dependent child" includes unborn children. Following the axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary, *Banks* v. *Chicago Grain Trimmers Assn.*, 390 U. S. 459, 465 (1968); *Minor* v. *Mechanics Bank of Alexandria*, 26 U. S. (1 Pet.) 46, 64 (1828), and reading the definition of "dependent child" in its statutory context, we conclude that Congress used the word "child" to refer to an individual already born, with an existence separate from its mother.

As originally enacted in 1935, the Social Security Act made no provision for the needs of the adult taking care of a "dependent child." It authorized aid only for the child and offered none to support the mother.[6] C. 531, § 406, 49 Stat. 629. The Act expressly contemplated that the first eligible child in a family would receive greater benefits than succeeding children, recognizing the lower per capita cost of support in families with more than

[6] The Act was amended in 1950 to authorize payment for the needs of the child's caretaker. Act of Aug. 28, 1950, c. 809, § 323, 64 Stat. 551.

one child, *id.*, § 403 (a), but the Act included no similar provision recognizing the incremental cost to a pregnant woman of supporting her "child." The Act also spoke of children "living with" designated relatives, *id.*, § 406 (a), and referred to residency requirements dependent on the child's place of birth. *Id.*, at § 402 (b). These provisions would apply awkwardly, if at all, to pregnant women and unborn children. The failure to provide explicitly for the special circumstances of pregnant women strongly suggests that Congress had no thought of providing AFDC benefits to "dependent children" before birth.[7]

The purposes of the Act also are persuasive. The AFDC program was originally conceived to substitute for the practice of removing needy children from their homes and placing them in institutions, and to free widowed and divorced mothers from the necessity of working, so that they could remain home to supervise their children. This purpose is expressed clearly in President Roosevelt's message to Congress recommending the legislation, H. R. Doc. No. 81, 74th Cong., 1st Sess., 29–30 (1935), and in committee reports in both Houses of Congress, S. Rep. No. 628, 74th Cong., 1st Sess., at 16–17 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess., at 10 (1935). See *Wisdom* v. *Norton*, 507 F. 2d 750, 754–755 (CA2 1974); Note, Eligibility of the Unborn for AFDC Benefits, 54 B. U. L. Rev. 945, 955–958 (1974). The restricted purpose of the AFDC program is evidenced in the Act itself by the limitations on aid. The Act originally authorized aid only for children living with designated relatives.[8] The list of relatives has grown, *ante*, at 3, but

[7] A number of other provisions of the Act would be similarly inapplicable to unborn children. See *Murrow* v. *Clifford*, 502 F. 2d 1066, 1075–1076 (CA3 1974) (Rosenn, J., dissenting).

[8] The original definition of "dependent child" was:

"a child under the age of sixteen who has been deprived of parental

there is still no general provision for AFDC payments to needy children living with distant relatives or unrelated persons, or in institutions.[9]

Congress did not ignore the needs of pregnant women or the desirability of adequate prenatal care. In Title V of the Social Security Act, now codified as 42 U. S. C. §§ 701–708, Congress provided federal funding for prenatal and postnatal health services to mothers and infants, explicitly designed to reduce infant and maternal mortality.[10] See S. Rep. No. 661, *supra*, at 20. In se-

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support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt, in a place of residence maintained by one or more of such relatives as his or their own home . . . ." § 406 (a), 49 Stat. 629.

[9] The Act now authorizes, in addition to payments for children in the homes of designated relatives, foster care payments for children who have been removed from the homes of relatives. 42 U. S. C. § 608. It also provides financial support for child-welfare services, in a form different from the direct payments in the general AFDC program, for "homeless, dependent, or neglected children." 42 U. S. C. §§ 622, 625.

The statement of purposes in the Act, amended several times since 1935, still indicates that Congress has not undertaken to provide support for all needy children:

"For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." 42 U. S. C. § 601.

[10] As Judge Weinfeld's opinion for the Second Circuit in *Wisdom v. Norton*, *supra*, at 755, points out, one of the major reasons for making welfare payments on behalf of an unborn child would be to enable its mother to purchase adequate prenatal care. The fact

lecting this form of aid for pregnant women, Congress had before it proposals to follow the lead of some European countries that provided "maternity benefits" to support expectant mothers for a specified period before and after childbirth. Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., at 182, 965–971 (1935). If Congress had intended to include a similar program in the Social Security Act, it very likely would have done so explicitly rather than by relying on the term "dependent child," at best a highly ambiguous way to refer to unborn children.

B

Respondents have also relied on HEW's regulation allowing payment of AFDC benefits on behalf of unborn children. They ask us to defer to the agency's longstanding interpretation of the statute it administers. Respondents have provided the Court with copies of letters and interoffice memoranda that preceded adoption of this policy in 1941 by HEW's predecessor, the Bureau of Public Assistance. These papers suggest that the agency initially may have taken the position that the statutory phrase "dependent children" included unborn children.[11]

A brief filed by the Solicitor General on behalf of HEW in this case disavows respondents' interpretation of the Act. HEW contends that unborn children

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that Congress explicitly provided medical care for expectant mothers in Title V is evidence "of a congressional intent *not* to include unborn children under AFDC but to provide for maternity care in a different section of the statute." *Id.*, n. 27.

[11] At oral argument petitioners' counsel objected to the inclusion of these materials in respondents' brief, noting that they were not in the record and had not been authenticated. Tr. of Oral Arg., Jan. 22, 1975, at 43–45. Respondent suggested that at least some of the materials are proper subjects for judicial notice. In the view we take of the case these materials are not dispositive, and it is unnecessary to resolve their status.

are not included in the federal eligibility standard and that the regulation authorizing federal participation in AFDC payments to pregnant women is based on the agency's general authority to make rules for efficient administration of the Act. 42 U. S. C. § 1302. The regulation is consistent with this explanation. It appears in a subsection with other rules authorizing temporary aid, at the option of the States, to individuals in the process of gaining or losing eligibility for the AFDC program. For example, one of the accompanying rules authorizes States to pay AFDC benefits to a relative 30 days before the eligible child comes to live in his home. 45 CFR § 233.90 (c)(2). HEW's current explanation of the regulation deprives respondents' argument of any significant support from the principle that accords persuasive weight to a consistent, long-standing interpretation of a statute by the agency charged with its administration. See *FMB* v. *Isbrandtsen Co.*, 356 U. S. 481, 499–500 (1958); *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932).

Nor can respondents make a convincing claim of congressional acquiescence in HEW's prior policy. In 1972, in the context of major Social Security legislation, both Houses of Congress passed bills to revise the AFDC system. One section of the Senate Bill would have amended the definition of "dependent child" expressly to exclude unborn children. H. R. 1, 92d Cong., 1st Sess. (as amended by Senate), 118 Cong. Rec. 33990, 33995 (1972); see S. Rep. No. 92–1230, 92d Cong., 1st Sess., at 108, 467 (1972). The House Bill would have substituted an entirely new definition of eligibility under the Administration's "Family Assistance Plan." H. R. 1, 92d Cong., 1st Sess., 117 Cong. Rec. 21450, 21463 (1971). The accompanying committee report specified that under the new definition unborn children would not be eligible

for aid. H. R. Rep. No. 92–231, 92d Cong., 1st Sess., at 184 (1972). Both bills passed the respective Houses of Congress, but none of the AFDC amendments appeared in the final legislation, Pub. L. 92–603, 86 Stat. 1329, because the House and Senate conferees were unable to agree on the underlying principle of welfare reform. All efforts to amend AFDC were postponed for another session of Congress. See 118 Cong. Rec. 36813–36825, 36926–36936 (1972); *Mixon* v. *Keller*, 372 F. Supp. 51, 55 (MD Fla. 1974). Under the circumstances, failure to enact the relatively minor provision relating to unborn children cannot be regarded as approval of HEW's practice of allowing optional benefits. To the extent this legislative history sheds any light on congressional intent, it tends to rebut the claim that Congress by silence has acquiesced in the former HEW view that unborn children are eligible for AFDC payments.[12]

C

In this case respondents did not, and perhaps could not, challenge HEW's policy of allowing States the option

[12] Several of the courts that have ruled in respondents' favor have interpreted the action of the 92d Congress as evidence of a "belief that unborn children are currently eligible under the Act 'and that only by amending its language can their status as eligible individuals be altered.'" *Parks* v. *Harden*, 504 F. 2d, at 872. See also *Carver* v. *Hooker*, 501 F. 2d 1244, 1247 (CA1 1974); *Wilson* v. *Weaver*, 358 F. Supp. 1147, 1155 (ND Ill. 1973), aff'd, 499 F. 2d 155 (CA7 1974). The House Bill does not lend itself to this interpretation because it was not designed to amend the existing AFDC structure but to create an entirely different system. The Senate Bill was framed as an amendment to the eligibility provisions in § 406 (a), but there is no evidence that its drafters believed unborn children were included in the existing definition of dependent children. It would be equally plausible to suppose that they thought HEW had misinterpreted the Act, and wanted to make the original intent clear. See *Wilson* v. *Weaver*, 499 F. 2d, at 161 (CA7 1974) (Pell, J., dissenting).

of paying AFDC benefits to pregnant women. We therefore have no occasion to decide whether HEW has statutory authority to approve federal participation in state programs ancillary to those expressly provided in the Social Security Act, see *Wisdom* v. *Norton, supra,* at 756, or whether 42 U. S. C. § 1302 authorizes HEW to fund benefits for unborn children as a form of temporary aid to individuals who are in the process of qualifying under federal standards. See *Parks* v. *Harden,* 504 F. 2d 861, 875–877 (CA5 1974) (Ainsworth, J., dissenting).

III

Neither the District Court nor the Court of Appeals considered respondents' constitutional arguments. Rather than decide those questions here, where they have not been briefed and argued, we remand the case for consideration of the equal protection and due process issues that were raised but not decided below.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 73–1708

Kevin J. Burns, Etc., et al., Petitioners, *v.* Linda Alcala et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[March 18, 1975]

MR. JUSTICE MARSHALL, dissenting.

As the majority implicitly acknowledges, the evidence available to help resolve the issue of statutory construction presented by this case does not point decisively in either direction. When it passed the Social Security Act in 1935 Congress gave no indication that it meant to include or exclude unborn children from the definition of "dependent child." Nor has it shed any further light on the question other than to consider, and fail to pass, legislation that would indisputably have excluded unborn children from coverage.

The majority has parsed the language and touched on the legislative history of the Act in an effort to muster support for the view that unborn children were not meant to benefit from the Act. Even given its best face, however, this evidence provides only modest support for the majority's position. The lengthy course of administrative practice cuts quite the other way. Although the question is a close one, I agree with the conclusion reached by five of the six courts of appeals that have considered this issue,[1] and would accordingly affirm the judgment below.

[1] Besides the court below, the circuit courts holding that unborn children are within the eligibility terms of § 406 (a) include the First, the Fourth, the Fifth, and the Seventh, see *Carver* v. *Hooker*,

The majority makes only passing reference to the administrative practice of 30 years' duration, under which unborn children were deemed eligible for federal AFDC aid where state programs provided funds for them. According to the majority, this longstanding administrative practice is deprived of any significant weight by HEW's present suggestion that it has always treated unborn children as being outside the statutory definition of "dependent child." The agency's characterization of its former position, however, misrepresents the history of the administrative practice.

As early as 1941 the Social Security Board faced the problem of whether unborn children were covered by § 406 (a) of the Act. At that time, the Board determined that under the Act federal funds could be provided to the States for aid to unborn children. The agency's governing regulation in the Handbook of Public Assistance Administration expressly included unborn children among those eligible for aid "on the basis of the same eligibility conditions that apply to other children." § 3412 (6). The language of the regulation and the inclusion of unborn children among five other classes of children eligible for AFDC payments under the definition of "dependent child" make it evident that the agency deemed unborn children to come within the terms of § 406 (a) of the Act.[2]

501 F. 2d 1244 (CA1 1974); *Doe* v. *Lukhard*, 493 F. 2d 54 (CA4 1974); *Parks* v. *Harden*, 504 F. 2d 861 (CA5 1974); *Wilson* v. *Weaver*, 499 F. 2d 155 (CA7 1974). Only the Second Circuit has taken the opposite view, *Wisdom* v. *Norton*, 507 F. 2d 750 (CA2 1974).

[2] Among the other "situations within the scope of the [statutory] term deprivation'" were "Children Living With Both Natural Parents," § 3412 (1); "Children Living With Either Father or Mother," § 3412 (2); and "Children of Unmarried Parents," § 3412 (5). In discussing the eligibility of the last group, the regulations noted, "The act provides for the use of aid to dependent children as a

This regulation remained unchanged until 1971, when it was placed in the Code of Federal Regulations as 45 CFR § 233.90 (c)(2)(ii). Although its language was altered somewhat, the regulation still provided that, in electing States, federal participation would be available for unborn children once the fact of pregnancy was confirmed by medical diagnosis. It was only when a series of lawsuits were filed seeking to have AFDC made available to unborn children in those States that did not provide for them in their local AFDC plans that the agency contended that unborn children were not really within the eligibility provisions of § 406 (a) after all.

After this Court's decisions in *King* v. *Smith*, 392 U. S. 309 (1968), *Townsend* v. *Swank*, 404 U. S. 282 (1971), and *Carleson* v. *Remillard*, 406 U. S. 598 (1972), it appeared obvious that if any class of potential beneficiaries was within the Act's eligibility provisions, the States were required to provide aid to them. Thus, if HEW had chosen to stick with its previous interpretation that unborn children were within the eligibility provision of § 406 (a), it would have had to require that all participating States grant benefits for unborn children. On the other hand, if it were determined that unborn children were not eligible under the Act, federal financing would not be available even in those States that provided AFDC aid for them. In order to preserve the status quo, the agency came up with the inventive solution of ascribing the "unborn children" regulation to its rulemaking power under § 1102 of the Act, and thus avoiding the mandatory effects of a finding of "eligibility" under § 406 (a).

This ingenious but late-blooming tactical switch does little, in my view, to cancel out the effect of the long and

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maintenance resource available on equal terms to all children who meet eligibility conditions." § 3412 (5).

consistent prior course of administrative interpretation of the Act. Since the agency's position in this and related cases is evidently designed to preserve its authority to extend federal aid on an optional basis in spite of *King*, *Townsend*, and *Carleson*, I would view somewhat skeptically the agency's assertion that it has never deemed unborn children to be within the eligibility provisions of § 406 (a).

Even if the agency's new position is not discounted as a reaction to the exigencies of the moment, the policies underlying the doctrine of administrative interpretation require more than simply placing a thumb on the side of the scale that the agency currently favors.[3] The agency's determination that unborn children are eligible for matching federal aid was made early in the life of the program, and the administrators of the Act determined only a few years after the Act's passage that making AFDC payments available to unborn children was consistent with the statutory purposes. This contemporaneous and long-applied construction of the eligibility provision and

[3] The reasons for assigning weight to an administrative agency's interpretation vary in part according to the role that Congress intended the agency to play in the lawmaking process. Where the act in question is an open-ended statute under which Congress did not "bring to a close the making of the law," but left the "rounding out of its command to another, smaller and specialized agency," *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 486 (1952) (Jackson, J., dissenting), the agency's shift in position, even at a late date, should be given substantial weight. See *NLRB* v. *J. Weingarten, Inc.*, — U. S. —, — (1975); *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 193–194 (1941). Plainly, however, Congress did not intend the term "dependent child" in this detailed and often-amended statute to be subject to re-examination and redefinition as the agency's perceptions of social needs changed. In cases such as this one, where the agency is intended merely to carry out the congressional mandate, a long-standing course of administrative interpretation is relevant primarily as a contemporaneous construction of the Act by persons dealing intimately with its terms on a day-to-day basis.

purposes of the Act is entitled to great weight—particularly in the case of a statute that has been before the Congress repeatedly and has been amended numerous times. The majority contends that because of the details of the unsuccessful 1972 legislative effort to exclude unborn children from coverage, the respondent can claim little benefit from the natural inference that the statute still included them among those eligible for aid. This may be so, but in light of the history of the administrative interpretation of § 406 (a), I cannot agree that the Act, in its present form, should be read to exclude the unborn from eligibility.

I dissent.